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Supreme Court, U.S.
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In the Supreme Court of the United States

June Term 2003

RICHARD C. ANGINO; ALICE K. ANGINO; KING DRIVE CORP.,

Petitioners

v.

J. THOMAS VAN WAGNER; JEFFERY SMITH; RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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163 pp

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether the appellate court erred in affirming the trial court's error in granting summary judgment as to Petitioners' *entire* civil rights action on the bases of "exhaustion of remedies" and/or "ripeness" where these defenses were *first* raised as affirmative defenses to Petitioners' *Second Amended* Complaint and raised *only* as to *additional* civil rights violations resulting from the Township's *highest body's* adoption of its 2000 Zoning Ordinance under factual circumstances indicative of exclusionary, arbitrary, and capricious zoning specifically intended to stop Petitioners' 12-year attempt to sell lots and develop their property and/or under circumstances where Respondents refused to voluntarily amend the 2000 Zoning Ordinance ("futility")?

Is "ripeness" an appropriate basis to dismiss a complaint where the highest municipal body passes an unconstitutional ordinance and refuses to amend same without going through the time consuming procedure of a constitutional challenge?

Is "futility" an appropriate legal exception to the "ripeness" doctrine?

CORPORATE DISCLOSURE STATEMENT

King Drive Corp., one of the Petitioners herein, is a Pennsylvania Corporation with its business address at 4503 North Front St., Harrisburg, PA 17110. King Drive Corp. has a division known as R. A. Nursery. All of the corporate stock of King Drive Corp. is owned by Richard Angino.

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Petition

IN THE SUPREME COURT OF THE UNITED STATES

June Term 2003

RICHARD C. ANGINO; ALICE K. ANGINO; KING DRIVE CORP.,

Petitioners

v.

J. THOMAS VAN WAGNER; JEFFERY SMITH; RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ALREADY ENTERED

The decision of the Court of Appeals for the Third Circuit is reported at *Richard C. Angino, Alice K. Angino, King Drive Corp., Appellants v. J. Thomas Van Wagner, Jeffery Smith, Richard Peffer, Individually and as Supervisors of Middle Paxton Township; Middle Paxton Township; Jeffrey A. Ernico; Mary Jane Davis, Individually and as Middle Paxton Township Codes Enforcement Officer; Light-Heigel & Associates, Inc.*, 53 Fed. Appx. 655, 2002 U.S. App. LEXIS 27379 (2002).

The decisions of the District Court are not reported.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals for the Third Circuit was filed on December 17, 2002. Your Petitioners sought Rehearing En Banc by Petition filed December 30, 2002. Rehearing was denied on March 13, 2003.

The Supreme Court of the United States has jurisdiction to review on a writ of certiorari by virtue of 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

This civil action was brought pursuant to 42 United States Code §1983 (107a) against a municipality and its officers for deprivation of rights guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions of Pennsylvania law include 53 P.S. §10604 providing "Zoning purposes" and 53 P.S. §10916.1, which sets forth a procedure for challenging the validity of zoning ordinances. The relevant Federal Rule of Civil Procedure is Rule 56 concerning motion for summary judgment.

STATEMENT OF THE CASE

Petitioners filed a civil action complaint for money damages in the U.S. District Court for the Middle District of Pennsylvania on *January 13, 2000* against Respondents, Middle Paxton Township and its officials, including the Township Supervisors, Engineer and Solicitor, in Dauphin County, Pennsylvania. Mary Jane Davis has been dismissed by agreement. The Complaint alleges deprivation of rights guaranteed to Petitioners by the Fourteenth Amendment to the Constitution of the United States in connection with Petitioners' attempt to develop their property over the past twelve years (Appendix 51a).

As a result of discovery, Petitioners sought permission and on *October 9, 2001,* the Trial Court permitted Petitioners' filing of a Second Amended Complaint (64a). Various provisions of the 2000 Middle Paxton Zoning Ordinance, which was adopted in *November 2000,* were asserted as *additional* civil rights violations.

Over a period of 18 months, commencing on May 2, 2000, and continuing until November 5, 2001, Petitioners wrote numerous letters pointing out the constitutional deficiencies of the proposed and later adopted 2000 Zoning Ordinance, *e.g.*, on September 12, 2001, Petitioner wrote:

> I am writing this letter to request that you immediately commence procedures to amend your zoning ordinance to conform with the law. The United States is a country of laws, and you may not disregard the law with impunity.

By letter from the Township solicitor dated November 12, 2001, Petitioners were told that the Supervisors considered Petitioners' requested amendments at their November 2001 meeting and refused to voluntarily amend the 2000 Zoning Ordinance.

In response to Respondents' Motions for Summary Judgment (85a), in accordance with local rule, Petitioners filed a 17-page "Plaintiffs' Summary of Undisputed Facts" with numerous supporting documents. The following facts are undisputed.

Statement of the Case

Middle Paxton Township occupies approximately 34,000 acres or 55 square miles with 14,000 acres of state game lands and a 1,000 acre state park adjoining Petitioners' land. Only 1,500 acres have been developed. According to the 2000 census, there are only 4,823 residents or 1 person per 7 acres, 1 dwelling unit per 16 acres. 97.7% of the residents are white, with only 24 African Americans and 34 Hispanics. Virtually all housing consists of single family detached dwellings, and 86% of the housing units are owner occupied. Although one would expect to find Middle Paxton Township in some remote section of Pennsylvania, in reality its southwest corner near Fishing Creek Valley Road (Pa. State Route 443) is approximately 3 miles from Harrisburg, Pennsylvania's capitol, with highly populated Susquehanna and Lower Paxton Townships in between. Census figures for Middle Paxton Township are dramatically different from adjoining Susquehanna and Lower Paxton Township as to population, race, owner occupancy and single family detached dwellings.

Petitioners acquired their first 52 acres of land in 1971 at a time when the existing ordinance permitted 15,000 square feet or 1/3-acre lots. Over time, Petitioners acquired 700 acres, equal to half of the acreage which has been developed for housing in Middle Paxton Township over the past 60 years. One parcel Petitioners acquired was a restaurant and inn. A second parcel was an 18-hole golf course *with an adjacent golf community where the houses were built on 1/3 and 1-acre lots.*

From the beginning (1971), with Anskar Realty and later King Drive Corp., Petitioners embarked upon a plan to sell lots, and at a great expenditure of time and money attempted to obtain approval from Respondents to sell lots. Petitioners also over numerous stumbling blocks laid by Respondents developed over the past 30 years at great expense of time and money commercial "gardens", a "resort", "retreat", "golf course", "spa and fitness center."

Before the 2000 Zoning Ordinance, Respondents contended that Petitioners' gardens, restaurant, inn, golf course, spa, resort were all non-conforming commercial uses in the agriculturally zoned district. Although grandfathered, further development was

limited. The 2000 Zoning Ordinance provided for "resorts" in agricultural districts but no special treatment of resorts, and numerous provisions to preclude the development of a golf, garden, spa, resort community, *e.g.*, arbitrary 3-acre minimums, no cluster housing, steep slopes starting at 12%, etc.

Although the golf course had been developed in the 60s and 70s with 1/3 and 1-acre lots and much of Fishing Creek Valley had been developed with little governmental interference, things began to change in the mid to late 1980s.

In the mid 1980s, then Township Supervisor, Kerry Pae, called a meeting of builders and developers and told them that Middle Paxton residents and the other two Supervisors had an anti-development attitude, and the developers and builders could forget about developing land in Middle Paxton Township.

In 1987, Middle Paxton Township adopted a Comprehensive Plan wherein the independently engaged municipal planner and the comprehensive plan committee made up of citizens of Middle Paxton Township recommended for the first time a "steep slopes" provision. The recommended "steep slopes" provision would require *two* acres for single-family dwellings that are constructed on slopes of *20%* or greater.

Although much of Fishing Creek Valley, Middle Paxton Township, and the golf community on Petitioners' 700 acres had been developed under prior ordinances that permitted 1/3, 1/2 and eventually 1-acre lots and slopes exceeding 20%, Middle Paxton Township Supervisors, without legal, engineering, rational, or even *remembered* bases, followed the recommendation of the 1987 Comprehensive Plan Committee and passed an amendment in 1988 to require 2-acre lots *but arbitrarily changed the "steep slopes" percentage from the recommended 20% to 15%*. (Ordinance No. 28, 1988, enacted March 7, 1988.) Shortly thereafter (March 6, 1991), the Supervisors again amended the zoning ordinance, again without legal, engineering, rational, or even remembered bases to arbitrarily require *three* acres for *12%* slopes, *five* acres for *15%*, and *ten* acres for *18%* slopes. Development was virtually brought to a halt as evidenced by a drop in the Middle Paxton Township popu-

lation from 5129 in 1990 to 4823 in 2000. During that ten-year period, Middle Paxton Township experienced its slowest growth rate of new houses in its 60-year recorded history.

As a result of the proposed construction in the mid 1990s of limited access interstate highway 22/322, Middle Paxton Township, which previously by its location was in the path of development, suddenly became easily accessible with limited access exits on Fishing Creek Valley Road and the other two valleys. Respondents proceeded to take steps to limit any potential population growth resulting from the Rt. 22/322 changes. A Comprehensive Plan Committee was formed in 1995 with Charles Guttenplan as the planner. The minutes of one of the first meetings recorded the predetermined goal of the Comprehensive Plan Committee.

> The common thread that runs through these interviews is that people don't want to see the Township change. *They also voiced their appreciation that the Township Supervisors were taking steps to maintain the character of the area.*

Respondent Supervisors adopted the Comprehensive Plan in 1998. The Supervisors then engaged Gannett Fleming (Richard Koch planner) to develop a new zoning ordinance from the Comprehensive Plan. The Respondent Solicitor was consulted although he denied any significant involvement.

The 1998 Comprehensive Plan designated 80% of the Township agricultural with arbitrary 3-acre minimum lot sizes even though the Township lacked the Municipal Planning Code prerequisites of prime soils and agricultural activity, 53 P.S. §10604 (113a), and openly defied established Pennsylvania Supreme Court precedent classifying arbitrary 2 and 3-acre lots in the path of development as unconstitutionally impermissible exclusionary zoning. *C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143 (Pa. 2002); *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970); *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965); and *Berman v. Board of Commissioners of Township of Lower Merion*, 147 Pa. Commonwealth Ct. 405, 608 A.2d 585 (1992). In response to the Township's comprehensive planner's

concern in designating 80 percent of the Township as "agricultural", the Township solicitor on October 27, 1997, agreed that the actions of the Township subjected 80% of the Township requiring lots larger than 1 acre to constitutional challenge, but they proceeded anyway.

Comprehensive Plan Committee member Bachman testified in her deposition that the Comprehensive Plan Committee recognized that they could control density by the allocation of various districts as agricultural, low, medium and high density, and therefore, classified Middle Paxton Township in such a fashion so as to keep the Township "rural" the way it was.

After Petitioner Richard Angino objected at a Comprehensive Plan public meeting to the dividing line of "agricultural" and "low density" at Petitioners' western boundary line, the line was drawn along Petitioners' eastern boundary, but when "resorts" were limited to "agricultural" zones, Petitioners were forced to choose between their resort and selling lots.

Although Respondents and zoning planners (Koch of Gannett Fleming) were aware of the development of Petitioners' golf course as a planned community with lots of 1/3 and one acre, the Comprehensive Plan and Zoning Ordinance's requirement of 2, 3, 5, and 10 acre lots for single family dwellings made any further development of that community impossible.

Although Dauphin County Planning in its 1992 comprehensive plan identified current land use and designated future land use as low density residential housing for the entire length of Fishing Creek Valley Road; the Middle Paxton Township Zoning Ordinance and official map limited low density and cluster housing to the approximately three mile western section of the seven mile length of Fishing Creek Valley Road relegating Petitioners' land to Agricultural/Rural Residential use and 2, 3, 5, and 10 acre lots.

Dauphin County Planning focused on Middle Paxton Township's failure to provide for medium and high density dwelling units in refusing to approve Middle Paxton Township's 2000 Zoning Ordinance (93a-96a).

Petitioners' land occupies more than one square mile and approximately 1/7 of the entire Fishing Creek Valley. This large parcel obviously was not being used as a farm or intended to be used as a farm, and as a point of known fact was developed and intended to be developed as a golf, garden, spa, resort community with existing and future lots of 1/3-1 acre on slopes exceeding 12, 15, and 18%.

Although the recognized definition of "steep slopes" is 25% and Dauphin County and adjacent Lower Paxton Township utilize 25% and Gannett Fleming's planner Koch and Attorney Zaleski agreed to the 25% definition, Middle Paxton Township arbitrarily retained the 1991 definition of "steep slopes" as 12%, 15% and 18% requiring 3, 5, and 10 acres. *See* 25% reference in *Williamson v. County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 180, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985). *See also*, 30% reference in *Hoehne v. County of San Benito*, 870 F.2d 529, 531 (9th Cir. 1989).

In the mid-1990s, Petitioners instituted state and federal actions dealing with Respondents' roadblocks to Petitioners' attempts to develop their property. *Angino v. Board of Supervisors of Middle Paxton Township*, No. 3459-S-1997 (Dauph. 1997); *Angino, et al. v. Middle Paxton Township*, No. 1:CV-97-1265 (M.D. Pa. 1997). The resulting March 16, 1998, settlement agreement and court order provided for the dismissal of the state and federal actions with the proviso that new actions could be instituted and prior discriminatory activity referenced as historical facts if Respondents did not live up to their agreement.

Petitioners' Summary of Undisputed Facts included at paragraph 47 a 12-year pattern of violation of Plaintiffs' civil rights including:

(a) 1989-1993—Petitioners' attempt to develop and sell seven building lots was reduced by Respondents' actions to four lots but still denied because of the Township's refusal to grant waivers of 500 feet to permit a 750 feet cul-de-sac. The Township had just a few years before granted a waiver to Cameron Geisel for a 1,280 foot cul-de-sac. After denying Petitioners' development, the Town-

ship amended its land development ordinance to permit 800 feet cul-de-sacs.

• • •

(c) 1989-1998—Respondents thwarted Petitioners' attempt to obtain approval of a ten-lot subdivision on 89+ acres by first contending that there was a dispute as to Petitioners' ownership of the land which delayed the development for approximately eight years and then by counting as "lots" pieces of land owned by others who said they would or might use Petitioners' roads. Respondents went so far as to demand a public road because individuals using Petitioners' spa would "probably use the road." Respondents also counted as "lots" land which was allocated for community septic systems, residual land owned by Petitioners, including land upon which Petitioners' spa and lodges sat, which had its own separate road.

• • •

(i) Mid-1990s—Respondents put Petitioners' retreat on holding tanks and yet would not approve a package treatment plant because Respondents contended Petitioners' use was "commercial."

(j) Judge Turgeon of the Dauphin County Court of Common Pleas ordered Respondents to sign the necessary papers for a package treatment plant.

(k) Mid-1990s—Respondents refused to permit the construction of overnight lodging even though the previously-existing nudist colony had overnight lodging contending that Petitioners' overnight accommodations were "commercial." Again, litigation was necessary, as well as the appointment of a mediator and only after extensive, expensive litigation were Petitioners permitted by the 1998 agreement to construct their lodges.

(l) 1998-Present—Despite an agreement between the parties in 1998, Respondents instituted litigation to close Petitioners' lodges which resulted in a payment of approximately $20,000 by Petitioners but a finding of bad faith against Respondents.

• • •

(o) 2001—Although granting building permits in 1992, 1995, and 2000, without the need for any development plans, Respondents in 2001 for no apparent reason demanded a land development plan for the 2000 addition to Petitioners' restaurant and through unreasonable additional demands delayed construction for more than six months costing Petitioners tens of thousands of dollars and *no building permit was issued until December 6, 2001, and that was a limited permit*.

(p) Respondent solicitor created and maintained separate business, personal, and activity files under the following categories: Angino advertising file, Angino health violations file, Angino consumer protections file, Angino criminal complaints, sewer, Angino's epistles, Angino Jane Fields, Angino Fishing Creek Acres, Angino newspaper articles, Angino parking lot plan, Angino permits, Angino pool and bath house, Angino sewer planning module, Angino sewage violations, Angino sewer matter, Angino spa building, Angino special occasion home, Angino's violations 1996, Angino's sketch plan.

The original complaint in the instant action was filed on *January 13, 2000*. That complaint references under Factual Bases for Relief (A) the property, (B) prior lawsuit, (C) settlement and discontinuance of prior action and (D) new factual circumstances arising after the date of the settlement agreement. [pre-January 13, 2000] par. 16, *et seq.*:

> 21. Since the date of the Settlement Agreement, Plaintiffs have been unsuccessful in obtaining Township approval with respect to a ten-lot subdivision located on approximately 90 acres of Plaintiffs' northern boundary adjacent to and west of Plaintiffs' Spa and Fitness Center adjacent to and north of Plaintiffs' "lodges."
>
> 22. For ten years, Plaintiffs have at great expense attempted to obtain approval of this ten-lot subdivision, but Defendants have conspired to preclude development for numerous illegal, arbitrary, and capricious reasons, including counting other land owned by Plaintiffs and others as "lots." Defendants have imposed over the ten-year period numer-

ous arbitrary, capricious, and unreasonable conditions. A copy of most recent denial is attached as *Exhibit 3.*

23. Defendants have, individually and as a group, illegally treated Plaintiffs' property as a non-conforming commercial use rather than as a permitted recreation, golf, resort, retreat use and, as a result, have limited overnight lodging accommodations to 50, precluded meeting spaces, and/or any expansion of dining and banquet facilities.

24. Defendants denied Plaintiffs' occupancy of their lodges by insisting on occupancy permits after the time period for denying occupancy permits had expired, by illegally insisting upon an impermeable core with respect to a dam that had already been built under circumstances where there only would be 7 or 8 feet of water for a period of 7 or 8 hours once every 25 years, and persisting in denying the permits and/or denying approval of the development plans by imposing other "bad faith" restrictions.

25. Defendants frivolously initiated litigation with respect to the occupancy of the lodges causing great expense to Plaintiffs.

26. Defendants illegally required bonding and adhesionary agreements and failed to cooperate in reducing bonding requirements. *Exhibit 4*

27. Defendants have persisted in treating Plaintiffs' commercial, recreational, and golf properties differently than similarly situated not-for-profit recreational facilities in direct violation of established law.

28. Defendants require ten percent slopes for roads in a mountainous terrain contrary to state and federal fifteen percent and sixteen percent recommendations that has precluded and/or made exorbitantly expensive Plaintiffs' contemplated development.

29. Defendants, in their Long Range Plan and proposed zoning changes, have separated Plaintiffs from all other citizens, initially drew a map that divided zoning uses by Plaintiffs' property lines, are currently contemplating zoning

changes that are specifically directed to Plaintiffs, and have made specific decisions to limit, stop, and/or make prohibitively expensive Plaintiffs' contemplated development.

30. Defendants continue to treat Plaintiffs differently from other citizens by their arbitrary and capricious actions with respect to stormwater management, sewage, zoning, etc.

Following the January 13, 2000 filing of the original complaint, Respondents *continued* in *various* ways and most particularly in the passing of the 2000 Zoning Ordinance on November 6, 2000, to violate Petitioners' civil rights. These *additional* violations and acts of discrimination are related under D of the Second Amended Complaint, par. 23, *et seq.* (67a, *et seq.*).

Paragraphs 36-65 of Petitioners' Second Amended Complaint *specifically relate* to Respondents' civil rights violation and discriminatory conduct *pertaining to the 1998 Comprehensive Plan and 2000 Zoning Ordinance* (69a-74a).

Paragraphs 66, *et seq.* deal with Respondents' violation of Petitioners' civil rights and discriminatory conduct with respect to issues *separate and apart* from the 1998 Comprehensive Plan and 2000 Zoning Ordinance, *e.g.*, Respondents' denial of land development plans pertaining to the sale of lots, the construction of overnight lodges and/or the refusal to give reasonable variances and waivers, the Township's "bad faith" found by Judge Turgeon, the arbitrator's decision in Petitioners' favor with respect to "steep slopes" and road grades, etc. *See*, par. 66-70 (74a). Also:

71. Defendants have been found guilty of bad faith by Judge Turgeon which was affirmed by the Commonwealth Court with respect to Defendants' actions pertaining to the handling of surface water for Plaintiffs' lodges, which constitutes collateral estoppel in the instant action. [Angino et al. v. Board of Supervisors of Middle Paxton Township et al., 764 A.2d 1154 (Pa. Commw. 2000)]

72. Defendants' insistence on 10% road grades and 12%, 15%, and 18% slopes with corresponding three, five, and ten acres in the Mockingbird Extended development was deter-

mined by the Arbitrator who previously participated as a mediator as contrary to the parties Settlement Agreement.

73. Defendants' denial of Plaintiffs' requested package treatment plant was reversed by the Dauphin County Trial Court.

74. Defendants' closure of Plaintiffs' Italian Garden restroom was reversed by the District Judge.

75. Defendants and Defendants' Solicitor through additional litigation closed Plaintiffs' lodges while seeking attorneys' fees and expenses of approximately $80,000 which was clearly exorbitant and so found by the Trial Court.

76. Defendant Solicitor Ernico at one time had 16 or 17 township clients, but for the past decade has principally one, Middle Paxton Township, and has utilized litigation generally and litigation with Plaintiffs particularly as a means for him and his firm to obtain billable hours.

77. Defendants have refused Plaintiffs' requests for expansion of Plaintiffs' resort for meeting rooms and dining facilities on the basis that same constituted impermissible commercial uses and have inconsistently required or not required subdivision plans with respect to additions. Incredibly, no plans were required when Defendants classified Plaintiffs' resort as a nonconforming use, but plans are now required at a time when Defendants permit "resorts." Plans were also not required with respect to the prior expansion of Plaintiffs' restaurant but now required with respect to the expansion of the restaurant; not previously required with two expansions of the spa which is in a steep slope area but now required with the restaurant where there is no steep slope issue.

78. Defendants have arbitrarily demanded numerous versions of plans for technicalities at great expense for technicalities.

79. Over the past ten years, Defendant Supervisors over and over again, have refused to follow the recommendations of their Planning Commission with respect to Plaintiffs' 1990/

91 proposed four-lot subdivision, a 1998 ten-lot subdivision, and a proposed 2000/2001 Mockingbird subdivision.

Petitioners also demonstrated civil rights violations and discriminatory actions related in subparagraphs (77a-78a).

At or about the time when Petitioners were requesting the District Court's permission to file a Second Amended Complaint, Petitioners were simultaneously requesting Respondents to *voluntarily* amend the 2000 Zoning Ordinance to remove its unconstitutional features.

(a) May 2, 2000

• • •

According to the map that was on display at the public hearing, both sides of Fishing Creek Valley Road for its entire length of 6 or 7 miles is basically two zones. There is little perceptible difference in any of land along Fishing Creek Valley Road.

(b) June 27, 2001

This morning I reviewed and tagged documents at Gannett Fleming. It is clear from the Gannett Fleming documents that Middle Paxton Township did not want to grow and has done everything in its power to preclude growth. One area that I found particularly enlightening deals with the "steep slope" section where Gannett Fleming inquired as to whether Middle Paxton desired to develop restrictions in steep slope areas (defined in excess of 25%). Middle Paxton Township officials drew a line through a line through the 25% and inserted 12%. Middle Paxton Township officials in effect redefined steep slopes from 25% to 12%. If there is a smoking gun, this is it.

(c) September 12, 2001

I am writing this letter to request that you immediately commence procedures to amend your zoning ordinance to conform with the law. The United States is a country of laws, and you may not disregard the law with impunity.

Thirty years ago, I bought the first 52 of my 700+ acres. I bought the land with another attorney and formed a corporation called Anskar Realty. Our plans were to retain three acres apiece and sell the remaining 46 acres as building lots. At that time, only 15,000 square feet, or approximately 1/3 acre, was required for residential building lots. We potentially had 100 lots available for sale at that time. As the years went by, other land was acquired and considerable money was spent to eventually proceed with development and the sale of lots.

Simultaneously with my acquiring land and expending money for development, Middle Paxton Township was amending its laws to require first 1/2 acre and then an acre for building lots. In 1988, your first steep slope law required two acres for slopes greater than 15%. You later amended that zoning ordinance to require three acres for 12%, five acres for 15%, and ten acres for 18% slopes.

The November 2000 Middle Paxton Township Zoning Ordinance arbitrarily and capriciously classified my 700 acres as A-RR Agricultural-Rural Residential, requiring three acres for each building lot, limiting cluster developments to low density zoning districts, precluded "resorts" in low density districts, and requiring that all districts comply with a steep slope law of three acres for 12%, five acres for 15%, and ten acres for 18% slopes. I was forced to choose between a resort and low density zoning.

The arbitrary three acre prerequisite for single family residences and arbitrary and capricious steep slopes zoning has precluded development as envisioned and planned by me, my wife, and King Drive over the past thirty years. My 700 acres which under prior law could have resulted in potentially 2,000 lots and realistically and in 1987 400-500 lots plus a resort is now limited to approximately 35-50 lots. An investment of millions of dollars and a potential recovery of $20-$40 million has been lost by your arbitrary and capricious actions to preclude development.

I have enclosed an outline with exhibits detailing your irresponsible actions.

You have singled me out for separate and disparate treatment by initially utilizing my western boundary line for low density and A-RR district treatment. When I pointed out this arbitrary disparity of treatment, you drew the demarcation between low density and A-RR along my western boundary line. You, however, limited resorts to A-RR zoning requiring that I choose between a "resort" and low density development. *See*, outline and maps.

Your solicitor has referred to me as a "problem" in his statement given to Gannett Fleming. You have granted others waivers to cul-de-sac length and package treatment plants, but denied same to me. You have defined "lots" contrary to the definition in *all* prior and present zoning law definition. You have denied every plan that I submitted for development up to some recent approvals which contained arbitrary and capricious prerequisites that I was forced to accept. You did this in the face of Planning Commission recommendations for approval.

I have been required to litigate almost continuously with you over the past ten years. Your solicitor was quoted by a former member of the Planning Commission as finding my forced litigation a good source of income. You took me before a District Justice with respect to bathrooms in my Italian Garden and a change from the nudist colony unisex bathroom to separate bathrooms for men and women. You insisted upon a clay core with respect to a dam that had already been built. Even after you knew that a mistake had been made, you insisted upon a clay core with respect to a dam when an alternative detention pond had been built. You insisted upon a $20,000 plastic liner so long as a drop of water flowed from the new retention pond to detention basin 2. You objected to filling in detention basin 2 even when same was no longer required by law and constitutes an eye sore.

Statement of the Case

You have been found guilty of bad faith before Judge Turgeon. Your request for $80,000 of reimbursement was reduced by Judge Turgeon to $20,000. You would never have spent *$80,000 in attorney and engineering fees in less than six months* with anybody but me. You have said time and time again that "cost is not a consideration" by implying that I can afford to spend $20,000 for plastic liners, $150,000 for detention basins, $375,000 for roads even when there is no health, safety, or welfare basis for demanding same, and the additional costs make the project unfeasible, e.g., $375,000 for roads for 10 lots. Mr. Smith's treatment of me has been so abominable able that I have had to walk out of Supervisors' meetings and/or bite my tongue rather than respond to his irrational, illogical, inexperienced, unknowing comments.

You were unsuccessful before the District Justice with respect to the Italian Garden bathrooms and with the arbitrator with respect to your demand for 10% road slope and steep slope prerequisite to Mockingbird Extended.

As a result of recent discovery, I have learned that you have been passing exclusionary zoning to preclude the development of my property solely because your desires and the desires of the majority of Middle Paxton Township are to keep the sparsely populated Middle Paxton Township as it is. Answers to questionnaires by Middle Paxton Township residents have stated they don't want development and view 322/22 as a potential danger to their rural life. *See*, outline. At hearings they have gone so far as to request that "outsiders" not be permitted to use recreational facilities in Middle Paxton Township.

I have been opposed because I potentially will bring "outsiders" in through my resort and development. Your solicitor considers me to be "a problem" as noted in the Gannett Fleming files.

• • •

I bring this to your attention because Rt. 443/Fishing Creek Valley Road is the next area in the pathway of development.

A $2.5 million house was built next to the Country Club of Harrisburg. A $500,000 home was built across the street, and now apparently a $5.0 million home is being constructed next to the $500,000 home at the other end of Fishing Creek Valley Road. Custer is now into Phase IV or V and continues to build and sell homes in the $350,000-$500,000 range. Midway between the western end of the three new homes and the eastern end where Custer is proceeding, the Township has recently approved the Thompson development. Mr. and Mrs. Thompson have entered into an agreement with Mr. Yingst to develop an approximately 45-lot subdivision adjacent to and directly east of my subdivisions of Mockingbird and Mockingbird Extended. It is anticipated that these lots will sell in the $75,000-$125,000 range and that the homes that will be built will be in the $350,000-$500,000 range. As you are aware, the Geisel development was approved, lots sold, and houses built over the last 13 or 14 years. The homes in the Geisel development apparently are in the $150,000-$350,000 range. Applications for building permits have been regularly received by Mary Jane Davis for middle to high end homes along Potato Valley Road and Frog Hollow Road.

As exhibits to my outline, you will see that there is absolutely no plan for agricultural use for all of Middle Paxton Township in the 1992 Dauphin County Comprehensive Plan. *All* of Fishing Creek Valley Road is proposed for "low density" development with commercial density at the western end. Your 2000 Zoning Ordinance enacted to stop development is directly contrary to the Dauphin County 1992 Comprehensive Plan. I assume the 2002 Dauphin County Comprehensive Plan will further emphasize the reactionary nature of Middle Paxton Township's 1998 Comprehensive Plan and 2000 Zoning Ordinance.

Although you are not bound to follow the Dauphin County Comprehensive Plan, your failure to consider the reasoning of the Dauphin County planners may well be interpreted as arbitrary and capricious actions on your part. Your

solicitor, in exchanged letters with your comprehensive plan expert, admitted that Middle Paxton Township zoning is open to constitutional challenge. *See*, outline exhibits. To zone land as "agricultural" the land must be of a Class I-IV category. Fishing Creek Valley Road does not have Class I-IV soils. There is no reasonable engineering or legal bases for designating 20-25% of Fishing Creek Valley as low density and the rest of the valley as predominantly Agricultural-Rural Residential. There is similarly no reasonable engineering or legal basis for arbitrarily requiring 3-acre lots for rural residential. *See*, outline.

Although your solicitor argued to the contrary, there is no question from the wording of the Zoning Ordinance, the maps that were prepared with respect to the Comprehensive Plan, the language of the Comprehensive Plan that a density of one lot per three acres was intended for the whole of Middle Paxton Township's Agricultural-Rural Residential areas. *See*, outline. Our Supreme Court has said time and time again that lots larger than one acre in size are presumably illegal when they are in the pathway as development. This is referred to as exclusionary zoning.

As pointed out, there is absolutely no distinction between the western and eastern ends of Fishing Creek Valley Road as far as slope, agricultural use, beauty, and all of the other factors mentioned in your zoning purposes. *See*, outline.

Your most outrageous actions pertain to your classification of steep slopes as 12, 15, and 18%. You Supervisors pass such a steep slope overlay in the face of Dresdner defining steep slopes as 20%, Your comprehensive plan expert using 20%, Gannett Fleming using 25%, Dauphin County using 25%, and Lower Paxton Township using 25%. From my research there is no governmental body and no expert utilizing a figure of less than 20% for steep slopes, and no governmental body requiring 3, 5, and 10 acres as you have done. *See*, outline.

> You cannot, and as I emphasize cannot, pass zoning laws as you have done requiring 3, 5, and 10 acres by arbitrarily classifying most of Middle Paxton Township and all of my property as Agricultural-Rural Residential and/or as involving steep slopes. You cannot require 10% grades for roads when PennDOT and AASHTO utilize 15 and 16% with respect to mountainous terrain.
>
> Yesterday, September 11, 2001, was a day of calamity with respect to airplanes crashing into buildings. It brings to mind that our country was founded upon a belief that the king can do wrong and government cannot take property from the citizens arbitrarily and capriciously without due process of law. All citizens and landowners are to be treated equally. The desires of the many cannot trammel on the rights of the few.
>
> I suggest that you immediately with your solicitor and with Gannett Fleming proceed to amend the Zoning Ordinance to conform with the law. You cannot at this point claim lack of knowledge. Any of your actions hereafter are clearly intentional and clearly directed at taking away my property and those of other citizens similarly situated.

Petitioners followed with letters of September 19, 2001, October 1, 2001, and October 12, 2001.

Respondents responded to Petitioners' series of letters by its solicitor's letter of November 9, 2001 stating that the Board had considered Petitioners' requests but, except for reducing from the 3 to 2 acres land required for building lots in agricultural areas, they were not going to voluntarily amend the 2000 Zoning Ordinance.

> However, as I am sure you are aware, if there are provisions in the Township Zoning Ordinance which you find objectionable, you have the option of filing a landowner curative amendment with the Township under Section 609.1 of the Pennsylvania Municipalities Planning Code to challenge the substantive validity of the provisions.

Respondents in their Defenses to Petitioners' Second Amended Complaint and in their Motions for Summary Judgment echoed the November 9, 2001, letter (80a-85a) and on *October 26 and 29, 2001,* Respondents filed affirmative defenses and on *November 21, and 23, 2001,* filed motions for summary judgment challenging the validity of Petitioners' *entire* civil action on, *inter alia,* the basis of exhaustion of administrative remedies and/or "ripeness" (87a-88a) because Petitioners did not file a constitutional challenge pursuant to law, 53 P.S. §10916.1.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioners disputed Respondents' "ripeness" argument on the bases that it would apply only to the 2000 Zoning Ordinance but even as to that statute the Township Supervisors were the highest municipal officials, that they passed the 2000 Zoning Ordinance to preclude Petitioners' development, refused to voluntarily amend the 2000 Zoning Ordinance, and, in light of the prior 12-year history, any further challenge would be "futile." Nevertheless, Petitioners, on February 27, 2002, filed a constitutional challenge with curative amendment. Simultaneously, Petitioners filed in the District Court a Motion to Extend Deadlines and Stay Proceedings.

Instead of granting Petitioners' stay motion, the district court, per the Hon. A. Richard Caputo, granted Respondents' motions for summary judgment on April 4, 2002, and dismissed without prejudice Petitioners' *entire* action on the basis that as Petitioners had not exhausted their administrative remedies by obtaining a decision on their constitutional challenge, the entire civil rights action was not "ripe".

Clearly the original Complaint and Amended Complaint referenced civil violations that *preceded* the passage of the *November 2000* Zoning Ordinance (48a-51a), including the finding of bad faith by the Dauphin County Court which was affirmed on appeal. It is also clear that on August 17, 2000, the District Court rejected Defendants' "ripeness" claim as to pre-November 2000 claims (117a-118a). Consequently, the entire Complaint and Amended Complaint could not be dismissed logically or legally on the basis of "ripeness" as to *all* claimed civil rights violations. The Trial Court did not provide any basis for the Court's change in position from August 17, 2000 (114a) to April 4, 2002 (7a).

Prior to this case the Third Circuit limited the "ripeness" doctrine to administrative decisions of lower level officials and not to ordinances adopted by the highest legislative bodies after legislative drafts, final drafts, meetings, and hearings. *New Hanover Township v. United States Corp of Army Engineers*, 992 F.2d 470, 472

(3d Cir. 1993). *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3d Cir. 1993); *Sameric Corporation of Delaware v. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998); *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993). *Also see*, district court decisions in *Glendon Energy Co. v. Borough of Glendon*, 836 F.Supp. 1109 (E.D. Pa. 1993) and *Thornbury Noble, Ltd. v. Thornbury Township*, 2002 U.S. Dist. LEXIS 4698 (E.D. Pa. March 20, 2002). All of these cases involved denial of building permits by lower level officials.

The Third Circuit held in *Sameric Corporation of Delaware v. City of Philadelphia*, 142 F.3d 582 (3d Cir 1998):

> 2. Denial of Demolition *Permit*
>
> • • •
>
> a. Ripeness
>
> • • •
>
> It is well established that, in cases involving land-use decisions, a property owner does not have a ripe, constitutional claim until the zoning authorities have had "an opportunity to 'arrive[ ] at a final, definitive position regarding how [they] will apply the regulations at issue to the particular land in question.' [*Taylor*] at 1291 (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985)). Thus, we have held that property owners' constitutional claims based upon land-use decisions were premature where the owners or tenants were denied *permits* by the *initial decision-makers* but did not avail themselves of available, *subsequent* procedures. *See Acierno v. Mitchell*, 6 F.3d 970, 974-75 (3d Cir. 1993). (owner was denied building *permit* by *Development and Licensing Division*, but did not *appeal* the denial to the *Board of Adjustment* or *seek a variance*); *Taylor*, 983 F.2d at 1289 (owner complained of the *zoning officer's revocation* of tenant's use *permit* where the tenant did not *reapply, appeal to the zoning board*, or *seek a variance*); *Midnight Sessions*, 945 F.2d at 686 (holding that the plaintiff's claim was not ripe

where it did not *appeal* the denial of a *certificate of occupancy* to the *review board*).

In *Acierno* and *Taylor*, the property owners challenged the denial and revocation of *permits*, respectively. In *Acierno*, the county approved the property owner's building plan, of which compliance with zoning ordinances is a prerequisite, but denied the owner's application for a building *permit*, citing noncompliance with zoning ordinances. *See Acierno*, 6 F.3d at 976. In *Taylor*, the *zoning officer* revoked a tenant's use *permit* because the tenant included false information in his application for the permit. The owner asserted that the basis for the revocation was a pretext and that the *officer* knew of the intended use for the property. *See Taylor*, 983 F.2d at 1289-90. Thus, in *Acierno* and *Taylor* the property owners alleged harm resulting from a land-use decision adverse to them.

In both cases, we held that the claims were not ripe because the property owners or the tenant did not give the *locality* an opportunity to make a *final* determination regarding how to construe the applicable ordinances and apply them to the particular property. The same is true here, where Sameric claims that the local land-use decision was based on an erroneous application or interpretation of the local ordinance. In addition, as in *Acierno* and *Taylor*, the applicable ordinance explicitly subjects the *initial decision* to review by *another body*, which owes no deference to the *initial decision-maker*. *See Acierno*, 6 F.3d at 972, 976; *Taylor*, 983 F.2d at 1292-93. Thus, we find that the *Department of Licenses'* denial was not the City's final determination of Sameric's rights to a demolition permit under the ordinance.

Sameric, 142 F.3d at 597 (footnotes omitted) (emphasis supplied).

In their appellate brief, Respondents resurrected their original 12(b) motion challenging the "ripeness" of Petitioners' claims of 12 years of violations. Under Respondents' reasoning, a municipality that violates a citizen's civil rights in dozens of ways, some large, some small, is insulated from a civil rights action unless and

until the citizen appeals or challenges or in some way exhausts all of his remedies as to *each* and *every* decision made by the municipality.

This was the same argument presented and initially rejected by the Trial Court on August 17, 2000 (117a-118a) but then adopted in its April 4, 2002 opinion (7a).

In addition to their "ripeness" arguments, Petitioners asserted the "futility" exception to the "ripeness" rule. The Ninth Circuit and the Supreme Court have issued opinions adopting a "futility" exception to the "ripeness" rule. *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), *aff'd, City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). *Also see*, recent Supreme Court decisions in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) and *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997).

The instant matter closely resembles *Del Monte Dunes at Monterey, Ltd. v City of Monterey*, 920 F.2d 1496 (9th Cir. Cal. 1990), *aff'd, City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). The Ninth Circuit refused to require resubmission of a development plan or application for a variance from prohibitive regulations *where those actions would be futile*.

Virtually all cases dealing with "ripeness" reference Your Court's opinion in *Williamson County Regional Planning Committee, et al. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 1308 (1985). This case also involved an owner of a tract of land who likewise sought to develop it utilizing cluster zoning. That is the only similarity to the facts in the instant case.

The Supreme Court in *Williamson* agreed that there is no requirement that a plaintiff exhaust administrative remedies before bringing a §1983 action. *Williamson*, 473 U.S. 172, at 192 and 193.

> ... While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the

> initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson, 473 U.S. at 193.

The Ninth Circuit's decision in *Hoehne v. Benito*, 870 F.2d 529 (9th Cir. 1989) provides facts more akin to the instant case. In 1984, the Hoehnes purchased a 60-acre parcel then zoned "rural" and permitting single family residences with 5-acre minimum lot sizes. The Hoehnes submitted a subdivision application to divide the property into 4 lots with an average size of 15 acres per lot. Defendants not only denied the Hoehnes' application, but later amended its zoning ordinance to require 40-acre lots. The Ninth Circuit's logic and reasoning is persuasive.

> A claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *[citing,] Williamson County*. ...
>
> Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," [citing *Penn Central*], this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations [citations omitted]. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.
>
> *Williamson*, 473 U.S. at 190-91, 105 S.Ct. at 3118-19.
>
> This court has held that the final decision requirement is applicable to substantive due process and equal protection

claims brought to challenge the application of land use regulations (citing authority) and is most likely applicable to related procedural due process claims, *id.* (applying final decision requirement to procedural due process claim); (citing authority) ...

The Supreme Court has recognized that land-use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to the full extent it may desire. Denial of the intensive development desired by a landowner does not preclude less intensive, but still valuable development. (citing *MacDonald,* 477 U.S. at 353, 106 S.Ct. at 2569. "The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *Id.* at 350, 106 S.Ct. at 2567. The property owner, therefore, has a high burden of proving that a final decision has been reached by the agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds.

Fortunately for the federal courts, the solution to this problem is not achieved by color-matching putative precedents and comparing snippets from stated rationales contained in past cases. As in many types of litigation, resolution of this issue turns on the record facts. Relevant cases in the Supreme Court and this court are extremely fact-specific. Only the facts tell us whether a final decision had been reached. And, to prove that a final decision was indeed reached, the facts of the case must be clear, complete, and unambiguous. This is such a case. We believe that the uncontroverted facts demonstrate that San Benito County had reached a final decision on the Hoehnes' application for subdivision of this land. We are persuaded that the County has drawn the line, clearly and emphatically, as to the sole use to which the Hoehnes' parcel may ever be put.

Hoehne, 870 F.2d at 532-533.

> We are satisfied that a final decision had been reached here because of the futility of any further attempts by the Hoehnes.

Hoehne, 870 F.2d at 535.

Petitioners have been in litigation since 1989 and have yet to sell a single lot because of numerous roadblocks laid down by Respondents. Requiring additional litigation based upon "ripeness" without a futility exception will result in Petitioners never being able to sell lots. Rulings from the highest municipal bodies will not be sufficient unless and *until* every possible challenge avenue has been pursued. The precedent of this case will sound the death knell to future development where municipalities desire to keep their community "as is."

CONCLUSION

Your Court should grant this Petition for Writ of Certiorari for the following reasons:

The Third Circuit panel decision in this case is in conflict with prior decisions of the Third Circuit in *New Hanover Township v. United States Corp of Army Engineers*, 992 F.2d 470 (3d Cir. 1993); *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3d Cir. 1993); *Sameric Corporation of Delaware v. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998); *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993) as to what types of decisions are final and "ripe."

This case involves a conflicts issue between the Third Circuit (panel decision) and trial court decision on one hand and the Ninth Circuit in *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. Cal. 1989) and the Supreme Court of the United States in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed. 2d 882 (1999) with respect to the futility exception to the "ripeness" doctrine. The issue of when actions should be "stayed" is also presented.

Although the first impression may be that the issues in this case are not of exceptional importance, closer examination reveals

that constitutionally protected property rights are involved and a property owner's right to sue a government entity in §1983 cases has been drastically limited by the panel decision in this case. Speaking to the importance of the issues in this case, it should be noted that the Supreme Court of the United States has chosen to review a number of land development issues in recent years regarding zoning laws and decisions that take, limit, or infringe on constitutionally protected property rights, *see e.g. Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed. 2d 592 (2001).

Respectfully submitted
ANGINO & ROVNER, P.C.
RICHARD C. ANGINO
I.D. No. 07140
Counsel for Petitioners

PROOF OF SERVICE

I, Richard C. Angino, Esquire, hereby certify that I have this 11th day of June, 2003, served three true and correct copies of Petition for Writ of Certiorari to the Third Circuit Court of Appeals by sending same by United States first-class mail, postage prepaid, to the following.

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Proof of Service

I further certify that all parties required to be served have been served.

Richard C Angino

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Appendix

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2060

RICHARD C. ANGINO; ALICE K. ANGINO;
KING DRIVE CORP.,
Appellants

v.

J. THOMAS VAN WAGNER; JEFFREY SMITH; RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer;
LIGHT-HEIGEL &
ASSOCIATES, INC.

Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. Civil No. 00-cv-00086)
District Court Judge: Honorable A. Richard Caputo

Submitted Pursuant to Third Circuit LAR 34.1(a)
on December 16, 2002

Before: SLOVITER, RENDELL and GREENBERG, *Circuit Judges*
(Filed December 17, 2002)

OPINION OF THE COURT

RENDELL, *Circuit Judge.*

Richard C. Angino, Alice K. Angino, and King Drive Corporation (together "the Anginos") brought this action against J. Thomas Van Wagner, Jeffery Smith, Richard Peffer, Middle Paxton Township, Jeffrey A. Ernico, Mette, Evans and Woodside, P.C., Mary Jane Davis, and Light-Heigel & Associates, Inc. (together

"Defendants") pursuant to 42 U.S.C. §1983, alleging violations of their civil rights. The District Court, exercising jurisdiction pursuant to 28 U.S.C. §1331, entered summary judgment in favor of all the Defendants. The Anginos now appeal.

We have jurisdiction to consider this appeal under 28 U.S.C. §1291. Our review is plenary and we review the facts in the light most favorable to the party against whom summary judgment was entered. *Bailey v. United Airlines*, 279 F.3d 194, 198 (3d Cir. 2002).

The Anginos contend that the enactment and interpretation of various land-use regulations in Middle Paxton Township deprived them of their constitutionally protected rights. Inasmuch as we write only for the parties, we will not further detail the factual background of the litigation. The District Court entered summary judgment without prejudice against the Anginos because they failed to avail themselves of available state procedures for challenging Defendants' alleged actions and their failure to do so rendered the claim not ripe for adjudication. In its memorandum opinion of April 4, 2002, the District Court engaged in a thoughtful analysis and, after conducting a careful review of the record in this case, we find no fault with its reasoning or its ruling. Accordingly, we will affirm.

TO THE CLERK OF COURT:

Please file the foregoing opinion.

/s/Marjorie O. Rendell
Circuit Judge

Dated: December 17, 2002

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2060

RICHARD C. ANGINO; ALICE K. ANGINO;
KING DRIVE CORP.,

Appellants

v.

J. THOMAS VAN WAGNER; JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; LIGHT-HEIGEL & ASSOCIATES, INC.

Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. Civil No. 00-cv-00086)
District Court Judge: Honorable A. Richard Caputo

Submitted Pursuant to Third Circuit LAR 34.1(a)
on December 16, 2002

Before: SLOVITER, RENDELL and GREENBERG,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and

was submitted pursuant to Third Circuit LAR 34.1(a) on December 16, 2002. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the Order of the District Court entered on April 4, 2002, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against the Appellants.

ATTEST:
/s/Kathleen Brower
Acting Clerk

Dated: December 17, 2002

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2060

RICHARD C. ANGINO; ALICE K. ANGINO;
KING DRIVE CORP.,

Appellants

v.

J. THOMAS VAN WAGNER; JEFFREY SMITH; RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; LIGHT-HEIGEL & ASSOCIATES, INC.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 00-cv-00086)
District Court Judge: Honorable A. Richard Caputo

Submitted Pursuant to Third Circuit LAR 34.1(a)
on December 16, 2002

Before: SLOVITER, RENDELL and GREENBERG,
Circuit Judges

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, and GREENBERG,
Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

• Hon. Morton I. Greenberg, Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel rehearing.

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:
/s/illegible
Circuit Judge

Dated: MAR 13 2003
LML\cc: RCA
JPL
CKP
CSU

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 3:CV-00-86

RICHARD C. ANGINO, ALICE K. ANGINO, and KING DRIVE CORP.,

Plaintiffs,

v.

J. THOMAS VAN WAGNER, et al.,[1]

Defendants.

FILED
SCRANTON
APR 4 2002
Per /s/Illegible
Deputy Clerk

(JUDGE CAPUTO)

MEMORANDUM

Plaintiffs, Richard C. Angino, Alice K. Angino, and King Drive Corporation, filed the present 42 U.S.C. §1983 action alleging that Defendants are violating their civil rights by preventing them from developing their land located in Middle Paxton Township. Defendants are J. Thomas Van Wagner, Jeffery Smith, Richard Peffer, (collectively Supervisors of Middle Paxton Township) Jeffrey A. Ernico, Mette, Evans, & Woodside, P.C., and Light-Heigel & Associates, Inc.

Presently before the Court are three (3) motions for summary judgment: (1) by Van Wagner, Smith, Peffer, and Middle Paxton Township (Doc. 61); (2) by Light-Heigel (Doc. 57); and (3) by Ernico and Mette, Evans & Woodside (collectively Ernico). (Doc. 63.) The motions have been fully briefed by all parties and are ripe for disposition. Because I find that Plaintiffs did not exhaust their administrative remedies, their claim is not ripe, and Defendants' motions for summary judgment will be granted.

[1] Mary Jane Davis, a named Defendant, was terminated as a party by stipulation approved on March 25, 2002. (Doc. 132.)

BACKGROUND

Plaintiffs own approximately 740 acres of land within Middle Paxton Township. For over a decade, they have attempted to develop their property as a golf, garden, and spa resort with overnight accommodations, conference rooms, banquet facilities, and single family dwellings. Plaintiffs claim that Defendants have enacted and interpreted zoning ordinances in a manner which deprives them of the right to develop this property, in violation of their federally protected rights. Specifically, Plaintiffs argue that the steep slope provisions, the road grade maximum slope provisions, the cul-de-sac length provisions, and the turning radius provisions of the subdivision and zoning ordinances have made development of their property financially impossible. Plaintiffs' complaint stems from the zoning ordinances restricting their ability to build on their property.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A disputed fact is material if proof of its existence or non-existence might affect the outcome of the suit under the applicable substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *See id.* at 248. An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmoving party under the governing standard. *See id.* at 248-53. Where there is a material fact in dispute, the moving party has the initial burden of proving that: 1) there is no genuine issue of material fact; and 2) she is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 329, 106 S. Ct. 2548, 2554 (1986). All doubts as to

the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. *See Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988).

DISCUSSION

In land use cases, ripeness is often disputed, and the court must address whether the property owner has satisfied the finality rule. *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1113-14 (E.D. Pa. 1993). It is well-recognized that one cannot assert a constitutional claim until it is ripe. The widely applied rule for zoning litigation states that a plaintiff may not sue in federal court to challenge the validity of a statute or ordinance unless they have exhausted their administrative remedies. *See Williamson County Reg'l. Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 190, 105 S.Ct. 3108 (1985.) Thus, Plaintiffs cannot state a cause of action under §1983 until they have first challenged the constitutionality of the ordinances under state and local law.

This case is similar to *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993), where a landowner brought an action against the county challenging that the denial of a building permit denied him of his right to develop his property commerically. *Acierno*, 6 F.3d at 975. The Third Circuit held that the landowner's claims were not ripe for judicial review because, although the county had made a final decision with respect to the landowner's development plans, the denial of the building permit was appealable to the board of adjustments. *Id.* at 977.

> [A] constitutional challenge to a land-use decision is not ripe unless state authorities are given an opportunity to arrive at a final, definitive position regarding how they will apply the regulations at issue to the particular land in question ... until [the] city renders a final decision on [an] application ... plaintiffs suffered no mature constitutional injury until township authorities had the opportunity to apply authoritatively their zoning regulations to the property.

Id. at 974 (citations omitted). The Third Circuit opined that "[l]ocal political bodies are better able than federal courts to assess the

benefits and burdens of such legislation." *Id.* at 275. Moreover, the property owner has a high burden of proving that a final decision has been reached by the agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds." *Id.* at 975 (quoting *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989)).

In this case, Plaintiffs could have submitted an application for a curative amendment to the Supervisors or a substantive challenge to the validity of the ordinance before the Zoning Hearing Board under the Municipal Planning Code, 53 P.S. §10916.1.[2] However, Plaintiffs did not do so, (Angino Dep., Doc. 79, Ex. D at 85-86, 257), stating that they were unaware that the law required them to do so.[3] (*Id.* at 92.) Therefore, Plaintiffs never gave the Supervisors or the Zoning Hearing Board the opportunity to arrive at a final position regarding how they would apply the regulations at issue to Plaintiffs' land. Plaintiffs are essentially attempting to use the federal courts as a super-zoning hearing board; however, this is not the proper use of the federal courts. *Sameric Corp. v. Delaware*, 142 F.3d 582, 598 (3d Cir. 1998).

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[2] The Municipalities Planning Code applies to zoning ordinances and land development ordinances. It provides, in relevant part:

> (a) A landowner who on substantive grounds, desires to challenge the validity of an ordinance or map of any provision thereof which prohibits or restricts the use or development of land in which he has an interest shall submit the challenge either:
> (1) to the zoning hearing board under section 909.1(a); or
> (2) to the governing body under section 909.1(b)(4), together with a request for a curative amendment under section 609.1 ...
>
> (c) The submissions referred to in subsections (a) and (b) shall be governed by the following ...
> (2) If the submissions is made by the landowners to the governing body under subsections (a)(2), the request also shall be accompanied by an amendment or amendments to the ordinance proposed by the landowner to cure the alleged defects therein.

53 P.S. §10916.1.

[3] Plaintiffs seemingly concede that their failure to exhaust their administrate remedies was unrelated to their subjective assessment that an appeal would be futile. (Angino Dep., Doc. 79, Ex. D at 86.)

In *Sameric Corp.*, a theater owner brought a §1983 claim against the city, alleging that the city violated its constitutional rights by designating the theater as a historic building and denying the plaintiff a permit to demolish the theater. *Sameric*, 142 F.3d at 587-589. The Third Circuit ruled that the substantive due process claim based upon the city's denial of an owner's application for permit to demolish the theater was not ripe yet for adjudication. *Id.* at 598.

> It is well established that, in cases involving land-use decisions, a property owner does not have a ripe, constitutional claim until the zoning authorities have had an opportunity to arrive at a final, definitive position regarding how they will apply the regulations at issue to the particular land in question. Thus we have held that property owners' constitutional claims based upon land-use decisions were premature where the owners or tenants were denied permits by the initial decision-makers, but did not avail themselves of available, subsequent procedures.

Id. at 597 (citations omitted).

In stressing the importance of the finality requirement, the Third Circuit noted that "local authorities are in a better position than the courts to assess the burdens and benefits of those varying interests". *Sameric*, 142 F.3d at 598.

While a plaintiff is not required to exhaust his administrative remedies where special circumstances dictate that pursuing additional relief would be fruitless, *Glendon Energy*, 836 F. Supp. at 1113-14, such special circumstances do not exist in this case. "To prove that a final decision was indeed reached, the facts of the case must be clear, complete, and ambiguous." *Hohne*, 870 F.2d at 533.

Plaintiffs argue that ripeness is not an issue for summary judgment where there are many alleged civil rights violations, which occurred for over a decade, and the zoning legislation was passed by the highest municipal body. Specifically. Plaintiffs argue that none of the cited cases show a pattern of discrimination by the highest municipal body, as Plaintiffs allege here. However, Plaintiffs do not offer any Third Circuit case law supporting the proposition that Plaintiffs are not required to exhaust their administra-

tive remedies or request a variance where the zoning regulation was enacted by the highest local agency. Nor have Plaintiffs shown that there is a material difference between this case and a case where a lower level official's decision was not appealed to the highest level. The fact remains that Plaintiffs never pursued their administrative remedies to the highest level. Moreover, while Plaintiffs argue that "a possible state remedy (curative amendment) does not preclude the bringing of a §1983 action for the same violation," (Brief in Opp., Doc. 85 at 12), they again do not cite any case law to support this proposition, and the Court was unable to discover a case that supported Plaintiffs' statement. In fact, the Third Circuit noted that in zoning cases, the finality requirement is not at odds with the notion that §1983 claims are not subject to an exhaustion requirement. *Sameric*, 142 F.3d at 597, n. 13.

Finally, Plaintiffs argue that they are not required resubmit or appeal a development plan or application where it would be futile, citing the Ninth Circuit case *Del Monte v. City of Montgomery*, 920 F.2d 1496 (9th Cir. 1990). In relying on the 1990 Ninth Circuit case, Plaintiffs ignore courts in this circuit's apparent repudiation of the case. *See Glendon Energy*, 836 F. Supp. at 1119, n. 12 ("in land use cases, the Third Circuit Court of Appeals has not, as of yet, adopted the 'futility exception.' Indeed, in *Taylor [Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285 (3d Cir. 1993)], the court repeatedly emphasized that unless a final decision had been rendered, the property owner's constitutional claim was premature. The court did not qualify its holding. Thus, *Taylor* may be fairly read to reject implicitly the futility exception in this circuit.") While other cases in this circuit cited *Del Monte* favorably, there may still be some doubt as to whether this doctrine is recognized in the Third Circuit. Even if this doctrine is recognized in this circuit, Plaintiffs have not met the *Del Monte* requirements; Plaintiffs have not made a showing from which the Court could infer that further applications or appeals to the zoning board would be futile.

Plaintiffs argue that an appeal to the Zoning Hearing Board would clearly be futile because the Board illustrated its intent by adopting the 1998 Comprehensive Plan and 2000 Zoning Ordi-

nance, and expressed a clear indication that it would not amend the ordinances. However, in *Del Monte*, the plaintiff submitted the same plan over and over, which was repeatedly denied. In this case, Plaintiffs have submitted "numerous development plans," none of which Plaintiffs appealed. Therefore, in *Del Monte*, by repeatedly denying the same plan, the defendants illustrated that any appeal on the same plan would be futile. In this case, since Plaintiffs have submitted different plans each time, and have never appealed, it lacks the same definitiveness that the Ninth Circuit noted in *Del Monte*. Plaintiffs have not presented evidence that refusal is inevitable or "the prospect of refusal [is] certain or nearly so." *Glendon Energy*, 836 F. Supp. at 1119 (citations omitted). "[T]he property owner, who bears the burden of proof, must make at least one application for administrative relief before the futility exception may be invoked." *Id.* At the time Plaintiffs commenced this action, they had not appealed this matter.[4] As the appropriate authorities have not had an opportunity to render a final decision on the nature and extent of the impact of the zoning ordinances, Plaintiffs' claim is not yet ripe.

CONCLUSION

The Court will not permit Plaintiffs to decide on their own that filing an appeal or otherwise exhausting their administrative remedies would be futile. This is a case where Plaintiffs are impermissibly attempting to use federal courts as a super-zoning hearing board. Accordingly, as Plaintiffs have not exhausted their adminis-

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[4] Plaintiffs submit evidence that they prepared and filed the challenge to the validity of the 2000 Zoning Ordinance coupled with a curative amendment on February 28, 2002. (Angino Aff., Doc. 117.) The ripeness doctrine works to "prevent the courts ... from entangling themselves in abstract disagreements over administrative policies, and also protects the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507 (1967). Though it appears that Plaintiffs have now challenged the issue, there is no evidence that the Supervisors or Zoning Hearing Board has ruled on this challenge. Rather, the issue is presently pending. This gives the Court even greater incentive to refuse to decide on the merits of this case, which will perhaps now be resolved by the Zoning Hearing Board.

trative remedies, their claim is not ripe, and Defendants' motions for summary judgment (Docs. 57, 61, 63) are granted. Plaintiffs' complaint will be dismissed without prejudice.

An appropriate order will follow.

/s/A. Richard Caputo
A. Richard Caputo
United States District Judge

April 4, 2002
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FILED
SCRANTON
APR 04 2002
Per /s/Illegible
Deputy Clerk

CIVIL ACTION NO. 3: CV-00-86

(JUDGE CAPUTO)

RICHARD C. ANGINO, ALICE K. ANGINO, and KING DRIVE CORP.,

Plaintiffs,

v.

J. THOMAS VAN WAGNER, JEFFERY SMITH, RICHARD PEFFER, Individuality and as Supervisors of Middle Paxton Township, JEFFREY A. ERNICO, METTE, EVANS, & WOODSIDE, P.C., MARY JANE DAVIS, Individuality and as Middle Paxton Township Codes Enforcement Officer, and LIGHT-HEIGEL & ASSOCIATES, INC.,

Defendants.

ORDER

NOW, this 4th day of April 2002, IT IS HEREBY ORDERED that:

1. Defendant Light-Heigel's motion for summary judgment (Doc. 70) is **GRANTED.**

2. Defendants Van Wagner, Smith, Peffer, and Middle Paxton Township's motion for summary judgment (Doc. 66) is **GRANTED.**

3. Defendants Ernico and Mette, Evans & Woodside's motion for summary judgment (Doc. 76) is **GRANTED.**

4. Plaintiffs complaint is **DISMISSED WITHOUT PREJUDICE.**

5. The Clerk of Court is directed to mark this case as closed.

/s/A. Richard Caputo
A. Richard Caputo
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT COURT OF
PENNSYLVANIA

CIVIL ACTION—LAW

FILED
SCRANTON
APR 11 2002
Per /s/Illegible
Deputy Clerk

NO. 1:CV-00-0086

(JUDGE CAPUTO)

JURY TRIAL DEMANDED

RICHARD C. ANGINO, ALICE K. ANGINO, and
KING DRIVE CORP.,

Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Defendants

NOTICE OF APPEAL

Notice is hereby given that PLAINTIFFS RICHARD C. ANGINO, ALICE K. ANGINO, and KING DRIVE CORP. hereby appeal to the United States Court of Appeals for the Third Circuit from the Order entered in this matter on April 4, 2002, granting the Motions for Summary Judgment filed by Defendants. This Order has been reduced to judgment and entered in the docket, as evidenced by the attached copy of the docket entry.

Respectfully submitted,
ANGINO & ROVNER, P.C.
Richard C. Angino, Esquire
I.D. No. 07140
Joan L. Stehulak, Esquire
I.D. No. 29496
4503 N. Front Street
Harrisburg, PA 17110
(717) 238-6791
Attorneys for Plaintiffs

Certified from the record
Date 4/12/02
Mary E. D'Andrea, Clerk
Per /s/illegible
Deputy Clerk
Date: 4/8/02

TERMED HBG

U.S. District Court
Middle District of Pennsylvania (Scranton)
CIVIL DOCKET FOR CASE #: 00-CV-86

Angino, et al v. Van Wagner, et al — Filed: 01/13/00
Assigned to: Judge A. Richard Caputo — Jury demand: Both
Demand: $5,000,000 42043 — Nature of Suit: 440
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 42:1983 Civil Rights Act

RICHARD C. ANGINO plaintiff	Richard C. Angino 17172385610 [COR LD NTC] Angino & Rorner, P.C. 4503 N. Front Street Harrisburg, PA 17110 717-238-6791
ALICE K. ANGINO plaintiff	Richard C. Angino (See above) [COR LD NTC]
KING DRIVE CORP. plaintiff	Richard C. Angino (See above) [COR LD NTC]
v.	
J. THOMAS VAN WAGNER defendant	C. Kent Price [COR LD NTC] Thomas, Thomas & Hafer P.O. Box 999 305 North Front St. Harrisburg, PA 17108 717-255-7632
	Kathryn L. Simpson 17172361816 klsimpson@mette.com [COR LD NTC] Mette, Evans & Woodside

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Jeffrey Lewis
[COR LD NTC]
McKissock & Huffman, PC
P.O. Box 3066
West Chester, PA 19380
610-738-8850

JEFFREY SMITH
defendant

C. Kent Price
(See above)
[COR LD NTC]
Jeffrey Lewis
(See above)
[COR LD NTC]

RICHARD PEFFER,
Individually and as
Supervisors of Middle
Paxton Township
defendant

C. Kent Price
(See above)
[COR LD NTC]

Jeffrey Lewis
(See above)
[COR LD NTC]

MIDDLE PAXTON
TOWNSHIP defendant

C. Kent Price
(See above)
(COR LD NTC]
Kathryn L. Simpson
(See above)
[COR LD NTC]
Jeffrey Lewis
(See above)
[COR LD NTC]

JEFFREY A. ERNICO defendant	C. Kent Price [term 03/22/00] (See above) [COR LD NTC] Kathryn L. Simpson (See above) [COR LD NTC] Jeffrey Lewis (See above) [COR LD NTC]

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METTE, EVANS & & WOODSIDE, P.C. defendant	C. Kent Price [term 03/22/00] (See above) [COR LD NTC] Kathryn L. Simpson (See above) [COR LD NTC] Jeffrey Lewis (See above) [COR LD NTC]
MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement officer defendant [term 03/25/02]	C. Kent Price [term 03/25/02] (See above) [COR LD NTC) Kathryn L. Simpson [term 03/25/02] (See above) [COR LD NTC] Jeffrey Lewis [term 03/25/02]

	(See above) [COR LD NTC]
LIGHT-HEIGEL & ASSOCIATES INC. defendant	Christopher S. Underhill [COR LD NTC] Hartman, Underhill & Brubaker 221 East Chestnut Street Lancaster, PA 17602 717-299-7254

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Proceedings include all events. TERMED
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1/13/00	1	COMPLAINT—N/C given. Jury trial demanded. Receipt #: 130356 Amt: 150.00 (pc) [Entry date 01/13/00]
1/13/00	—	SUMMONS ISSUED as to defendants. (pc) [Entry date 01/13/00]
1/20/00	2	ORDER by Judge Yvette Kane IT IS ORDERED THAT the undersigned shall be recused from the above-captioned action. IT IS FURTHER ORDERED THAT the Clerk of Court shall reassign the case to another judge. (cc: all counsel, Ct, & Judge Kane) (jh) [Entry date 01/20/00]
1/20/00	—	REMARK—Case file sent to Judge Caputo. (jh) [Entry date 01/20/00]
1/28/00	3	LETTER ORDER by Judge A. R. Caputo regarding case assignment and providing practices and procedures for effective case managment. (cc: all counsel court) (sm) [Entry date 01/28/00]
2/16/00	4	ENTRY OF ATTORNEY APPEARANCE for defendants J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Middle Paxton Townsh, Jeffrey A. Ernico, Mette, Evans & Woods and Mary Jane

		Davis by C. Kent Price, Esquire and c of s. (jh) [Entry date 02/17/00]
2/17/00	—	REMARK—Document 4 sent to Scranton. (jh) [Entry date 02/17/00]
2/18/00	5	ENTRY OF ATTORNEY APPEARANCE for defendant Light-Heigel & Associates, Inc., by atty Christopher S. Underhill. (pm) [Entry date 02/22/00]
2/22/00	—	REMARK—Doc 5 to J. Caputo. (pm) [Entry date 02/22/00]
2/23/00	6	WAIVER OF SERVICE OF SUMMONS returned as to defendant Light-Heigel & Assoc ;request sent 1/19/00 (ta) [Entry date 02/23/00]
2/23/00	7	WAIVER OF SERVICE OF SUMMONS returned as to defendant Jeffrey—Smith, defendant Richard Peffer, defendant Middle Paxton Townsh, defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods, defendant Mary Jane Davis, defendant J. Thomas Van Wagner ;request sent 1/17/00 (ta) [Entry date 02/23/00]
3/17/00	8	JOINT MOTION by defendants Jeffrey Smith, Richard Peffer, Middle Paxton Township, Jeffrey A. Ernico, Mette, Evans & Woods, Mary Jane Davis, J. Thomas Van Wagner to dismiss and for a more definite statement.; Cert Conc/noncurr., C/S, Propo. (pm) [Entry date 03/20/00]
3/20/00	—	REMARK—Doc 8 to J. Caputo. (pm) [Entry date 03/20/00]

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3/20/00	9	ENTRY OF ATTORNEY APPEARANCE for defendants Jeffrey A. Ernico, t Mette, Evans & Woodside by atty Jeffrey P. Lewis. C/S. (pm) [Entry date 03/21/00]

3/20/00	10	MOTION by defendant Light-Heigel & Associates, Inc. for joinder in motion to dismiss and for a more definite statement. [8-1]; C/S. (pm) [Entry date 03/21/00]
3/20/00	11	MOTION by defendant Light-Heigel & Associates, Inc. for a more definite statement.; C/S, Propo. (pm) [Entry date 03/21/00]
3/20/00	12	BRIEF by defendant Light-Heigel & Associates, Inc. IN SUPPORT of motion for a more definite statement. [11-1]; C/S. (pm) [Entry date 03/21/00]
3/21/00	—	REMARK—Docs 9-12 to J. Caputo. (pm) [Entry date 03/21/00]
3/21/00	—	REMARK—Doc 8 to case file copies w/proposed order to J. Caputo. (kn) [Entry date 03/21/00]
3/22/00	13	PRAECIPE FOR WITHDRAWAL OF APPEARANCE by C. Kent Price, Esq., and law firm of Thomas, Thomas & Hafer, LLP, as cnsl. for Dfts. Jeffrey A. Ernico and Mette, Evans & Woodside, P.C.; C/S. (vg) [Entry date 03/23/00]
3/23/00	—	REMARK—Doc. #13 to J. Caputo. (vg) [Entry date 03/23/00]
3/27/00	14	BRIEF by Dfts., Jeffrey—Smith, Richard Peffer, Middle Paxton Township, Jeffrey A. Ernico, Mette, Evans & Woodside, Mary Jane Davis, J. Thomas Van Wagner IN SUPPORT of motion to and for a more definite statement. [8-1]; C/S. (vg) [Entry date 03/28/00]
3/28/00	—	REMARK—Doc. #14 to J. Caputo. (vg) [Entry date 03/28/00]
4/12/00	15	AMENDED complaint [1-1]; substantive only; jury demand; answer due 4/25/00 for Light-Heigel & Assoc, for J. Thomas Van Wagner, for Jane Davis, for Mette, Evans & Woodside, for Jeffrey A. Ernico, for Middle Paxton Town-

		ship, for Richard Peffer, for Jeffrey—Smith; C/S. (vg) [Entry date 04/13/00]
4/13/00	—	REMARK—Doc. #15 to J. Caputo. (vg) [Entry date 04/13/00]
4/26/00	16	MOTION by J. Thomas Van Wagner, Jeffrey—Smith, Richard Peffer, Middle Paxton Township, Jeffrey A. Ernico, Mette, Evans & Woodside, Mary Jane Davis to dismiss the amended complaint and for more definite stmt.; Cert. of Conc./Non-Conc.; C/S; Propo. (vg) [Entry date 04/27/00]
4/27/00	—	REMARK—Doc. #16 to J. Caputo. (vg) [Entry date 04/27/00]

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Proceedings include all events. TERMED
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5/5/00	17	ANSWER by defendant Light-Heigel & Associates, Inc. to amd. cmp.; C/S. (vg) [Entry date 05/08/00]
5/8/00	—	REMARK—Doc. #17 to J. Caputo. (vg) [Entry date 05/08/00]
5/8/00	18	BRIEF by Dfts. J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Middle Paxton Township, Jeffrey A. Ernico, Mette, Evans & Woodside, Mary Jane Davis IN SUPPORT of motion to dismiss the amended complaint and for more definite stmt. [16-1]; C/S. (vg) [Entry date 05/09/00]
5/9/00	—	REMARK—Doc. #18 to J. Caputo. (vg) [Entry date 05/09/00]
5/22/00	19	BRIEF by plaintiffs IN OPPOSITION to motion to dismiss the amended complaint and for more definite stmt. [16-1]; reply brief due 6/5/00; with c/s. (sc) [Entry date 05/23/00]
5/23/00	—	REMARK—Doc #19 sent to Scranton. (sc) [Entry date 05/23/00]

5/23/00	20	RESPONSE by plaintiffs to answer and affirmative defenses of defendant Light-Heigel & Associates, Inc. and c of s. (jh) [Entry date 05/24/00]
5/24/00	—	REMARK—Document 20 sent to Scranton. (jh) [Entry date 05/24/00]
6/23/00	21	ORDER by Judge A. R. Caputo—finding the dft Light-Heigel's motion for a more definite statement. [11-1] and the other dfts' motion to dismiss and for a more definite statement. [8-1] are deemed moot. (cc: all counsel court) (cl) [Entry date 06/23/00]
6/23/00	22	SUPPLEMENTAL AUTHORITY IN OPPOSITION by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. to dfts' motion to dismiss (cl) [Entry date 06/26/00]
7/17/00	23	REPLY BRIEF by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods in support of motion to dismiss the amended complaint and for more definite stmt. [16-1] (ao) [Entry date 07/18/00]
8/17/00	24	MEMORANDUM AND ORDER: by Judge A. R. Caputo—1) denying dfts' motion to dismiss the amended complaint. 2) Dfts' motion for more definite Statement [16-1] is denied. (cc: all counsel court) (cl) [Entry date 08/17/00]
10/4/00	25	ANSWER and AFFIRMATIVE DEFENSES by Dfts Smith, Peffer, Middle Paxton Township, Ernico, Mette, Evans & Woods, Davis, & Van Wagner; jury demand; with c/s. (sc) [Entry date 10/05/00]
10/30/00	26	ORDER by Judge A. R. Caputo Case Management Conference set for 11:00 12/13/00 (cc: all counsel court) (sm) [Entry date 10/30/00]

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12/7/00	27	MOTION by defendant Light-Heigel & Associates, Inc. to compel pltfs to answer interrogatories and request for prod of documents.; C/S, Propo. (pm) [Entry date 12/08/00]
12/7/00	28	MEMORANDUM by defendant Light-Heigel & Associates, Inc. IN SUPPORT OF motion to compel pltfs to answer interrogatories and for prod of documents. [27-1]; C/S. (pm) [Entry date 12/08/00]
12/12/00	29	ORDER by Judge A. R. Caputo Case Management Conference rescheduled for 10:00 on 1/5/01 (cc: all counsel court) (sm) [Entry date 12/12/00]
12/18/00	30	BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN OPPOSITION to motion to compel pltfs to answer interrogatories and request for prod of documents. [27-1]; reply brief due 1/1/01; with c/s. (ta) [Entry date 12/20/00]
12/18/00	31	RESPONSE by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. to motion of defendant Light-Heigel & Assoc. to compel plaintiffs to answer interrogatories; with c/s. (ta) [Entry date 12/20/00]
12/28/00	32	CASE MANAGEMENT FORM returned (cl) [Entry date 12/28/00]
1/8/01	33	MINUTE SHEET of case mgmt. conf. held by Judge A. R. Caputo on 1/5/01 by telephone. CTR: none (ps) [Entry date 01/08/01]
1/24/01	34	CASE MANAGEMENT ORDER by Judge A. R. Caputo THAT: 1) Pursuant to the expense and delay reduction plan adopted by this court, this case is assigned to the COMPLEX case management track and shall be placed on the February,

2002 trial list of this court. 2) motions to amend pleadings shall be filed no later than September 30, 2001 3) all discovery shall be commenced in time so as to be completed by July 30, 2001 4) Plaintiff shall comply with the requirements of FRCP 26(a) (2) with respect to expert witnesses not later than August 15, 2001. Defendant shall comply not later than September 15, 2001. Supplemental expert reports shall be due by September 30, 2001. 5) Disclosures required by FRCP 26(a) (3) shall be made by October 15, 2001 6) all dispositive motions along with supporting briefs shall be filed by October 15, 2001. The deadline for in limine motions will be set by further order of this ocurt. 7) a pretrial conference will be held in January, 2002, date and time to be announced. 8) a telephone status conference is scheduled for Monday, March 26, 2001 at 10:30 a.m. ;trial set 2/1/02 ;discovery cutoff 7/30/01 ;pretrial conference Case placed on COMPLEX Case Mgmt. Track (cc: all counsel court) (ts) [Entry date 01/24/01]

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3/1/01 35 MEMORANDUM AND ORDER: by Judge A. R. Caputo [27-1] that Light Heigel & Assc's motion to compel pltfs to answer interrogatories and request for prod of documents is DENIED in part without prejudice and GRANTED in part as follows: 1. It is denied w/o prejudice as to Interrogatories 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, and 13; 2. It is GRANTED as to interrogatory 7. Plaintiff shall answer 7 within twenty days of this order; With respect to the request for production

		of docs, pltfs are ordered to comply with FRCP 34. (cc: all counsel court) (sm) [Entry date 03/01/01]
8/3/01	36	MINUTE SHEET of Conference case call held 7/30/01 CTR: NONE (sm) [Entry date 08/03/01]
8/3/01	37	MOTION by plaintiffs to compel production and responses to interrogatories and impose sanctions; with exhibits and c/s. (sc) [Entry date 08/07/01]
8/3/01	38	BRIEF by plaintiff IN SUPPORT of motion to compel production and responses to interrogatories and impose sanctions [37-1]; with c/s. (sc) [Entry date 08/07/01]
8/10/01	39	AMENDED CASE MANAGEMENT ORDER by Judge A. R. Caputo THAT: 1) This case shall be placed on the April, 2002 trial list of this court. 2) Motions to amend pleadings shall be filed no later than November 9, 2001. 3) All discovery shall be commenced in time so as to be completed by September 7, 2001. 4) Plaintiff shall comply with the requirements of FRCP 26(a) (2) with respect to expert witnesses not later than September 26, 2001. Defendant shall comply not later than October 26, 2001. Suppl expert reports shall be due November 9, 2001. 5) Disclosures required by FRCP 26(a) (3) shall be made by November 23, 2001. 6) All dispositive motions along with supporting briefs shall be filed by November 23, 2001. 7) A pretrial conference will be held in March, 2002 date and time to be announced. ;trial set 4/1/02 ;discovery cutoff 9/7/01 ;pretrial conference 3/1/02 (cc: all counsel court) (ts) [Entry date 08/10/01]
8/10/01	40	MOTION by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp.

to file a second amended complaint w/COS (hm) [Entry date 08/10/01] [Edit date 08/10/01]

8/10/01 41 BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN SUPPORT of motion to file a second amended complaint [40-1] (hm) [Entry date 08/10/01]

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8/13/01 42 BRIEF by defendant Middle Paxton Township, J. Thomas Van Wagner IN OPPOSITION to motion to compel production responses to interrogatories and impose sanctions [37-1] reply brief due 8/27/01. C/S (pm) [Entry date 08/14/01]

8/13/01 43 BRIEF by defendants Jeffrey A. Ernico, Mette, Evans & Woods IN OPPOSITION to motion to compel production and responses to interrogatories and impose sanctions [37-1] ;reply brief due 8/27/01. C/S, Propo. (pm) [Entry date 08/14/01] [Edit date 08/14/01]

8/17/01 44 REPLY BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. in support of motion to compel production and responses to interrogatories and impose sanctions [37-1] with c/s. (ts) [Entry date 08/17/01]

8/27/01 45 BRIEF by defendants J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Mary Jane Davis, Jeffrey A. Ernico, Middle Paxton Township and Mette, Evans & Woodside IN OPPOSITION to motion to file a second amended complaint and c of s; [40-1] reply brief due 9/10/01. (jh) [Entry date 08/28/01]

9/5/01 46 CERTIFICATE of CONCURRENCE/ NONCURRENCE by plaintiff Richard C.

Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. re: Petition to File Second Amended Complaint w/COS (hm) [Entry date 09/05/01] [Edit date 09/05/01]

9/5/01 47 EXHIBIT "B" by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. inadvertently omitted from the brief [41-1] in support of the petition to file second amended complaint w/COS (hm) [Entry date 09/05/01]

9/28/01 48 MOTION by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. To Compel Answers to Interrogatories and Responses to Request for Production of Documents w/certificate of nonconcurrence and COS (hm) [Entry date 10/01/01]

10/3/01 49 MEMORANDUM by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN SUPPORT OF motion To Compel Answers to Interrogatories and Responses to Request for Production of Documents [48-1] (hm) [Entry date 10/03/01]

10/9/01 50 ORDER by Judge A. R. Caputo that: 1) Plaintiffs' Petition to File a Second Amended Complaint [40-1] is GRANTED; 2) Defendants shall file their responses to the Second Amended Complaint w/in 20 days of the date of this order. (cc: all counsel court) (kn) [Entry date 10/09/01]

10/9/01 51 SECOND AMENDED complaint filed by plaintiffs jury demand; answer due 10/29/01 for defendants; c/s. (kn) [Entry date 10/09/01]

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10/17/01 52 BRIEF by defendant Middle Paxton Townsh IN OPPOSITION to motion To Compel Answers

		to Interrogatories and Responses Request for Production of Documents [48-1] w/COS; reply brief due 10/30/01 (hm) [Entry date 10/17/01]
10/18/01	53	MINUTE SHEET of conference call re: deadline for defendant's experts held on 10/18/01 before Judge Caputo (hm) [Entry date 10/18/01]
10/22/01	54	Third MOTION by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. to compel defendants to respond to plaintiff's request for production and request for admissions w/cert. of nonconcurrence and COS (hm) [Entry date 10/22/01]
10/22/01	55	BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN SUPPORT of third motion to compel defendants to respond to plaintiff's request for production and request for admissions [54-1] (hm) [Entry date 10/22/01]
10/22/01	56	Second Amended Case Management ORDER by Judge A. R. Caputo. Defendant shall comply with requirements of FRCP 26(a)(2) with respect to expert witnesses no later than 11/26/01 and supplemental expert reports shall be due 12/9/01. (cc: all counsel court) (hm) [Entry date 10/22/01]
10/29/01	57	ANSWER to second amended complaint by defendant Light-Heigel & Assoc w/COS (hm) [Entry date 10/30/01]
10/29/01	58	BRIEF by defendant Light-Heigel & Assoc IN OPPOSITION to motion to compel defendants to respond to plaintiff's request for production and request for admissions [54-1] w/COS; reply brief due 11/13/01 (hm) [Entry date 10/30/01]
10/29/01	59	RESPONSE to plaintiffs' third motion to compel by defendant Light-Heigel & Assoc w/COS (hm) [Entry date 10/30/01]

10/29/01	60	ANSWER by defendants Jeffrey A. Ernico, Mette, Evans & Woods to second amd. complt. w/ jury demand. C/S (pm) [Entry date 10/30/01]
10/29/01	61	ANSWER and AFFIRMATIVE DEFENSES by defendants Jeffrey Smith, Richard Peffer, Middle Paxton Townsh, Mary Jane Davis, J. Thomas Van Wagner to second amd complt. w/ jury demand. C/S (pm) [Entry date 10/30/01]
11/6/01	62	BRIEF by defendants Middle Paxton Township and Middle Paxton township Board of Supervisors IN OPPOSITION to pltf's third motion to compel defendants to respond to plaintiff's request for production and request for admissions [54-1], with c of s.; reply brief due 11/19/01. (mc) [Entry date 11/07/01] [Edit date 11/07/01]

11/8/01	63	AMENDED ANSWER by defendants Jeffrey A. Ernico, Mette, Evans & Woodside, PC w/ jury demand. C/S (pm) [Entry date 11/09/01]
11/19/01	64	MOTION by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods to exceed page limitation on a brief in support of summary judgment motion w/COS (hm) [Entry date 11/19/01]
11/21/01	65	ORDER by Judge A. R. Caputo granting motion to exceed page limitation on a brief in support of summary judgment motion [64-1] but not to exceed 26 pages. (cc: all counsel court) (sm) [Entry date 11/21/01]
11/23/01	66	MOTION by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Townsh, defendant Mary Jane Davis for summary judgment w/ concurrence and COS (hm) [Entry date 11/26/01]

11/23/01	67	BRIEF by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Townsh, defendant Mary Jane Davis IN SUPPORT of motion for summary judgment [66-1] w/COS (hm) [Entry date 11/26/01]
11/23/01	68	STATEMENT OF FACTS by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Townsh, defendant Mary Jane Davis in support of motion for summary judgment [66-1] w/COS (hm) [Entry date 11/26/01]
11/23/01	69	EXHIBITS by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Townsh, defendant Mary Jane Davis in support of motion for summary judgment [66-1] w/COS (hm) [Entry date 11/26/01]
11/23/01	70	MOTION by defendant Light-Heigel & Assoc for summary judgment (hm) [Entry date 11/26/01]
11/23/01	71	BRIEF by defendant Light-Heigel & Assoc IN SUPPORT of motion for summary judgment [70-1] (hm) [Entry date 11/26/01]
11/23/01	72	APPENDIX filed by defendant Light-Heigel & Assoc to brief in support of motion for summary judgment [71-1] (hm) [Entry date 11/26/01]
11/23/01	73	STATEMENT OF UNDISPUTED FACTS by defendant Light-Heigel & Assoc in support of motion for summary judgment [70-1] (hm) [Entry date 11/26/01]
11/23/01	74	DISCLOSURE of witnesses and exhibits pursuant to F.R.C.P. 26(a) (3)—by defendant Light-Heigel & Assoc (hm) [Entry date 11/26/01]

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11/23/01	75	CERTIFICATE OF SERVICE of motion for summary judgment, brief in support, appendix to brief, statement of facts, and disclosure of witnesses and exhibits by Christopher Undrehill, attorney for defendant Light-Heigel & Assoc (hm) [Entry date 11/26/01]
11/23/01	76	MOTION by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods for summary judgment w/COS (hm) [Entry date 11/26/01]
11/23/01	77	BRIEF by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods IN SUPPORT of motion for summary judgment [76-1] w/COS (hm) [Entry date 11/26/01]
11/23/01	78	STATEMENT OF FACTS by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods in support of motion for summary judgment [76-1] w/COS (hm) [Entry date 11/26/01]
11/23/01	79	EXHIBITS by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods in support of motion for summary judgment [76-1] w/COS (hm) [Entry date 11/26/01]
11/23/01	80	Proposed Trial EXHIBIT LIST by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods, defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, Middle Paxton Townsh, defendant Mary Jane Davis w/COS (hm) [Entry date 11/26/01]
11/23/01	81	Trial WITNESS LIST submitted by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods, defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Townsh, defendant Mary Jane Davis w/COS (hm) [Entry date 11/26/01]

11/26/01	82	MEMORANDUM AND ORDER: by Judge A. R. Caputo granting motion to compel production and responses to interrogatories and denying request for sanctions [37-1]. Defendants shall respond to the interrogatories within 20 days and shall make arrangements with the plaintiffs for a complying response to the request for documents within 20 days. (cc: all counsel court) (hm) [Entry date 11/26/01]
12/6/01	83	TRIAL WITNESS LIST submitted by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. w/COS (hm) [Entry date 12/06/01]
12/6/01	84	PROPOSED TRIAL EXHIBIT LIST by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. w/COS (hm) [Entry date 12/06/01]

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12/10/01	85	BRIEF by plaintiffs contra defendants' motions for summary judgment; mtn. for sj [76-1]; reply brief due 12/24/01, mtn for sj [70-1] ; reply brief due 12/24/01, mtn for sj [66-1]; reply brief due 12/24/01, with c of s. (mc) [Entry date 12/11/01]
12/10/01	86	STATEMENT OF UNDISPUTED FACTS (Captioned "Summary") by plaintiffs in opposition to statements of facts [78-1], [73-1] and [68-1] with c of s. (mc) [Entry date 12/11/01]
12/10/01	87	TAPE—Video of: Fishing Creek Valley Rd. (Rt. 443), Rt. 209 & Rt. 325 Roads off of Fishing Creek Valley Rd. (mc) [Entry date 12/11/01]
12/13/01	88	CERTIFICATE of CONCURRENCE of remaining defendants and NON-CONCURRENCE of plaintiffs to relief requested in Mo-

		tion for Summary Judgment by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods w/COS (seal) [Entry date 12/13/01]
12/21/01	89	REPLY BRIEF by defendant Light-Heigel & Assoc in support of motion for summary judgment [70-1] w/COS (hm) [Entry date 12/21/01]
12/21/01	90	RESPONSE by defendant Light-Heigel & Assoc to plaintiffs' statement of undisputed facts w/COS (hm) [Entry date 12/21/01]
12/26/01	91	ORDER by Judge A. R. Caputo DENYING pltf's 3rd motion to compel defendants to respond to plaintiff's request for production and request for admissions [54-1] (cc: all counsel court) (sm) [Entry date 12/26/01]
12/26/01	92	REPLY BRIEF by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods in support of motion for summary judgment [76-1] w/COS (hm) [Entry date 12/27/01]
12/26/01	93	RESPONSE by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods to plaintiffs statement of undisputed facts w/COS (hm) [Entry date 12/27/01]
12/26/01	94	RESPONSE by Dfts. J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Middle Paxton Township, Mary Jane Davis to pltfs' stmt of undisputed facts; C/S. (vg) [Entry date 12/27/01]
12/26/01	95	REPLY BRIEF by Dfts. J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Middle Paxton Township, Mary Jane Davis in support motion for summary judgment [66-1]; C/S. (vg) [Entry date 12/27/01]

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1/2/02	96	MEMORANDUM AND ORDER: by Judge A. R. Caputo granting in part and denying in part motion To Compel Answers to Interrogatories and Responses Request for Production of Documents [48-1]. It is granted as follows: The defendant, Middle Paxton Township, shall answer interrogatories 1-9 and shall provide the documents requested in plaintiffs' request fo rproduction of documents, set V, request no. 1. It is denied as to plaintiffs' motion to compel as to request no. 2 in plaintiffs' request for production of documents, set V. (cc: all court) (hm) [Entry date 01/02/02]
1/2/02	97	LETTER to court dated 12/27/01 from Jeffrey P. Lewis, attorney for defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods. requesting an oral argument be scheudled re: motions for summary judgment (hm) [Entry date 01/03/02]
1/22/02	98	ORDER by Judge A. R. Caputo setting motion for summary judgment [66-1] by defendantsi Wagner, Smith, Peffer, Davis and Middle Paxton Township for oral argument at 11:00 2/8/02 in Harrisburg, setting motion for summary judgment [70-1] by Light-Heigel & Associates for oral argument at 11:00 2/8/02 in Harrisburg and setting motion for summary judgment [76-1] by Ernico Mette, Evans & Woods for oral argument at 11:00 2/8/02 in Harrisburg (cc: all counsel court ct rptr) (hm) [Entry date 01/22/02] [Edit date 01/22/02]
2/1/02	99	Second MOTION by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. to compel and impose sanctions w/COS (hm) [Entry date 02/01/02]

2/1/02	100	BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN SUPPORT of motion to compel and impose sanctions [99-1] w/COS (hm) [Entry date 02/01/02]
2/1/02	101	AFFIDAVIT of Richard C. Angino regarding motion for summary judgment and motion to compel and impose sanctions [99-1] w/COS (hm) [Entry date 02/01/02]
2/6/02	102	FOURTH MOTION by plaintiff Richard C. Angino, plaintiff Alice K. Angino, defendant Jeffrey Smith to compel and to impose sanctions w/ nonconcurrence and COS (hm) [Entry date 02/06/02]
2/6/02	103	BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN SUPPORT of motion to compel and to impose sanctions [102-1] w/COS (hm) [Entry date 02/06/02]
2/6/02	104	SECOND AFFIDAVIT of Richard Angino regarding motion to compel and impose sanctions [99-1] and motion for summary judgment w/COS (hm) [Entry date 02/06/02]

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2/7/02	105	THIRD AFFIDAVIT of Richard C. Angino regarding motion fo summary judgment and motions to compel and to impose sanctions w/COS (hm) [Entry date 02/07/02]
2/13/02	106	BRIEF by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods IN OPPOSITION to motion to compel and impose sanctions [99-1] and request that defendants' motion for sanctions be grantedi w/COS; reply brief due 2/26/02 (hm) [Entry date 02/13/02]

2/13/02	107	MOTION by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods for sanctions against plaintiffs Richard C. Angino, Alice K. Angino, and King Drive Corp. w/COS (hm) [Entry date 02/13/02]
2/13/02	108	BRIEF by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods IN SUPPORT of motion for sanctions against plaintiffs Richard C. Angino, Alice K. Angino, and King Drive Corp. [107-1] w/COS (hm) [Entry date 02/13/02]
2/13/02	109	AFFIDAVIT of Jeffrey Lewis regarding motion for sanctions against plaintiffs Richard C. Angino, Alice K. Angino, and King Drive Corp. [107-1], regarding opposition brief [106-1] (hm) [Entry date 02/13/02]
2/14/02	110	FOURTH AFFIDAVIT of Richard C. Angino regarding motion for summary judgment and motions to compel and to impose sanctions [102-1], [99-1] w/COS (hm) [Entry date 02/14/02]
2/20/02	111	ORDER by Judge A. R. Caputo rescheduling oral argument on Defendants' motions for summary judgment for 2:30 on 2/25/02 in a courtroom to be determined in Scranton (cc: all counsel court ct rptr) (hm) [Entry date 02/20/02]
2/21/02	112	REPLY BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. in support of motion to compel and impose sanctions [99-1] w/COS (hm) [Entry date 02/21/02]
2/21/02	113	BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN OPPOSITION to motion for sanctions against plaintiffs Richard C. Angino, Alice K. Angino, and King Drive Corp. [107-1] w/COS; reply brief due 3/6/02 (hm) [Entry date 02/21/02]

2/26/02	114	MINUTE SHEET of oral argument re: discovery and summary judgment motions held 2/25/02 before Judge Caputo. Motions taken under advisement. CTR: Terruso (hm) [Entry date 02/26/02]
2/28/02	115	MOTION by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. to extend deadlines and continue trial w/nonconcurrence and COS (hm) [Entry date 02/28/02]

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2/28/02	116	MOTION by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. to amend the second amended complaint to substitute the word "conspired" for "collaborated" throughout the second amended complaint and add a separate civil conspiracy count w/nonconcurrence and COS (hm) [Entry date 02/28/02]
2/28/02	117	AFFIDAVIT of Richard Angino stating that he has prepared and filed the Challenge to the Validity of the 2000 Zoning Ordinance Coupled with a Curative Amendment attached w/COS (hm) [Entry date 02/28/02]
3/1/02	118	BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN SUPPORT of motion to extend deadlines and continue trial [115-1] w/COS (hm) [Entry date 03/01/02]
3/1/02	119	BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. IN SUPPORT of motion to amend the second amended complaint to substitute the word "conspired" for "collaborated" throughout the second amended complaint and add a separate civil con-

spiracy count [116-1] w/COS (hm) [Entry date 03/01/02]

3/11/02 120 REPLY BRIEF by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods in support of motion for sanctions against plaintiffs Richard C. Angino, Alice K. Angino, and King Drive Corp. [107-1] with Cert of Service. (ao) [Entry date 03/12/02]

3/11/02 121 STIPULATION that all claims asserted against dft Mary Jane Davis, personally, shall be dismissed w/o prejudice to any claims asserted by the pltfs against Middle Paxton Township forwarded to Judge Caputo for approval. (sm) [Entry date 03/13/02]

3/14/02 122 BRIEF by defendant Light-Heigel & Assoc IN OPPOSITION to motion to extend deadlines and continue trial [115-1]; reply brief due 3/27/02 (sm) [Entry date 03/14/02]

3/14/02 123 BRIEF by defendant Light-Heigel & Assoc IN OPPOSITION to motion to amend the second amended complaint to substitute the word "conspired" for "collaborated" throughout the second amended complaint and add a separate civil conspiracy count [116-1] ;reply brief due 3/27/02 (sm) [Entry date 03/14/02]

3/15/02 124 BRIEF by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods IN OPPOSITION to motion to extend deadlines and continue trial [115-1] with Exhibits & Cert of Service; reply brief due 3/28/02 (ao) [Entry date 03/15/02]

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3/15/02 125 BRIEF (Entitled "Reply") by defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods IN

		OPPOSITION to motion to amend the second complaint [116-1] with Cert of Service; reply brief due 3/28/02 (ao) [Entry date 03/15/02]
3/21/02	126	STENO NOTES of proceedings (Oral Argument) held 2/25/02 before Judge Caputo CTR: Terruso (hm) [Entry date 03/21/02]
3/21/02	127	MOTION by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Township to stay proceedings re: plaintiffs' challenge to zoning ordinance and request for curative amendment w/COS (hm) [Entry date 03/21/02]
3/21/02	128	BRIEF by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Townsh IN SUPPORT of motion to stay proceedings re: plaintiffs' challenge to zoning ordinance and request for curative amendment [127-1] w/COS (hm) [Entry date 03/21/02]
3/21/02	129	MOTION by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Townsh, defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods, defendant Light-Heigel & Assoc for sanctions against plaintiff, Richard C. Angino w/ COS (hm) [Entry date 03/22/02]
3/22/02	130	BRIEF by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Mary Jane Davis, defendant Middle Paxton Townsh IN OPPOSITION to motion to extend deadlines and continue trial [115-1] w/COS; reply brief due 4/4/02 (hm) [Entry date 03/22/02] [Edit date 03/22/02]
3/22/02	131	ANSWER by defendant J. Thomas Van Wagner, defendant Jeffrey Smith, defendant Richard Peffer, defendant Mary Davis, defendant Middle

Paxton Townsh to Plaintiff's Motion to Extend Deadlines and Continue Trial w/COS (hm) [Entry date 03/22/02]

3/25/02 132 ORDER by Judge A. R. Caputo approving stipulation [121-1] for Dismissal of Defendant Mary Jane Davis. terminating party Mary Jane Davis (cc: all counsel court) (hm) [Entry date 03/25/02]

3/26/02 133 REPLY BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. in support of motion to amend the second amended complaint to substitute the "conspired" for "collaborated" throughout the second amended complaint and add a separate civil conspiracy count [116-1] w/COS (hm) [Entry date 03/27/02]

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3/26/02 134 REPLY BRIEF by plaintiff Richard C. Angino, plaintiff Alice K. Angino, plaintiff King Drive Corp. in support of motion to extend deadlines and continue trial [115-1] w/COS (hm) [Entry date 03/27/02]

3/28/02 135 ORDER by Judge A. R. Caputo for Plaintiffs to file and serve an answer and brief in response to motion to stay proceedings re: plaintiffs' challenge to zoning ordinance and request for curative amendment [127-1] 4/10/02 (cc: all counsel court) (hm) [Entry date 03/28/02]

4/1/02 136 AFFIDAVIT of Mary Jane Davis in support of motion for sanctions against plaintiff, Richard C. Angino [129-1] (hm) [Entry date 04/01/02]

4/1/02 137 BRIEF by defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton

		Townsh, defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods, defendant J. Thomas Van Wagner, defendant Light-Heigel & Assoc IN SUPPORT of motion for sanctions against plaintiff, Richard C. Angino [129-1] with c/s. (ts) [Entry date 04/01/02]
4/1/02	138	CERTIFICATE of NON-CONCURRENCE by defendant Jeffrey Smith, defendant Richard Peffer, defendant Middle Paxton Townsh, defendant Jeffrey A. Ernico, defendant Mette, Evans & Woods, defendant J. Thomas Van Wagner, defendant Light-Heigel & Assoc re: motion for sanctions (ts) [Entry date 04/01/02]
4/4/02	139	ORDER by Judge A. R. Caputo granting motion for summary judgment [76-1], granting motion for summary judgment [70-1], granting motion for summary judgment [66-1], dismissing the complaint [1-1] without prejudice, and directing the Clerk of Court to close this case Case terminated (cc: all counsel court sec) (hm) [Entry date 04/04/02)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT COURT OF
PENNSYLVANIA

CIVIL ACTION—LAW

NO. 1:CV-00-0086

JURY TRIAL DEMANDED

RICHARD C. ANGINO, ALICE K. ANGINO, and KING DRIVE CORP., Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC., Defendants

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AMENDED COMPLAINT

AND NOW, come the Plaintiffs, Richard C. Angino, Alice K. Angino, and King Drive Corp., by and through their attorneys, Angino & Rovner, P.C., and pursuant to Fed.R.Civ.P. 15(a) file the following Amended Complaint against Defendants and allege as follows:

I—*JURISDICTION AND VENUE*

1. This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1343(a) and principles of pendant jurisdiction.

2. Venue is proper in this district under 28 U.S.C. §1391(b) because all Defendants reside in this district, a substantial part of the events or omissions giving rise to the claims set forth herein occurred in this district, and the property that is the subject of the action is situated in this district.

II—*THE PARTIES*

3. Plaintiffs Richard C. Angino and Alice K. Angino, (hereinafter "Anginos") are adult individuals whose address is 2040 Fishing Creek Valley Road, Harrisburg, Pennsylvania 17112.

4. Plaintiff King Drive Corp. (hereinafter "King Drive"), is a Pennsylvania Corporation, with its business address at 4503 North Front Street, Harrisburg, Pennsylvania 17110.

5. Defendant Middle Paxton Township (hereinafter "Township"), is a township of the first class, duly organized under the laws of the Commonwealth of Pennsylvania, with offices at 1304 Overlook Street, P.O. Box 277, Dauphin, Pennsylvania 17018.

6. Defendant Thomas J. VanWagner (hereinafter "VanWagner"), a Township Supervisor at all times relevant to this Complaint, is an adult individual with a principal mailing address of 3111 Clarks Valley Road, Dauphin, Pennsylvania 17018.

7. Defendant Jeffrey Smith (hereinafter "Smith"), a Township Supervisor during some of the times relevant to this Complaint, is an individual with a principal mailing address of 1751 Stony Creek Road, Dauphin, Pennsylvania 17018.

8. Defendant Richard Peffer (hereinafter "Peffer"), a Township Supervisor at all times relevant to this Complaint, is an adult individual with a principal mailing address of 115 Riverview Road, Dauphin, Pennsylvania 17018.

9. The Defendant Supervisors are members of the Defendant Board of Supervisors (hereinafter collectively the "Board") which is the governing body of the Township. This action is brought against Defendant Supervisors in both their personal and official capacities.

10. Defendant Mary Jane Davis, the Township Enforcement Officer at all times relevant to this Complaint, is an adult individual with a principal mailing address of 1304 Overlook Street, Dauphin, Pennsylvania 17018. This action is brought against her in both her personal and official capacity.

11. Defendant Mette, Evans & Woodside, P.C. (hereinafter "Mette Evans") is a Pennsylvania Professional Corporation with a

business address at 3401 N. Front Street, Harrisburg, Pennsylvania 17110.

12. Defendant Jeffrey A. Ernico, Esquire (hereinafter "Ernico"), the Township Solicitor, at all times relevant to this Complaint, is an adult individual with a principal mailing address of 701 Grantham Road, Grantham, Pennsylvania. This action is brought against him in both his personal and official capacity.

13. At all times relevant to this Complaint, Ernico was a servant, agent, apparent agent, and/or employee of Mette Evans and was acting within the course and scope of his employment by Mette Evans.

14. Defendant Light-Heigel hereinafter "Light-Heigel") is an engineering firm licensed to do business in the Commonwealth of Pennsylvania and having its principal place of business located at 430 East Main Street, Palmyra, Pennsylvania.

III—*FACTUAL BASES FOR RELIEF*

A. *The Property*

15. The Anginos directly or through King Drive are the equitable and legal owners of approximately 700 acres (more than one square mile) of land on Fishing Creek Valley Road, Middle Paxton Township, Pennsylvania.

16. The Anginos acquired, developed, and marketed over the past 30 years at great expense of time and money commercial "gardens," a "resort," "retreat, "golf course," "spa and fitness center."

B. *Prior Lawsuit*

17. Plaintiffs previously filed a civil rights lawsuit against many of the same Defendants to No. 1-CV-97-1265, Vanaskie, J., alleging various constitutional violations and other illegal actions. A copy of the previously-filed Amended Complaint and exhibits is attached as **Exhibit 1** to this Complaint.

C. *Settlement and Discontinuance of Prior Action*

18. The parties entered into a Settlement Agreement on March 16, 1998, which settled and resolved the then-pending legal actions. Copy of Settlement Agreement attached as **Exhibit 2.**

19. The Settlement Agreement provided:

2.6.1 The Anginos agree to withdraw their pending Federal Action which is in the nature of a federal Civil Rights

action against the Township, its elected and appointed officials and to execute a Release of all of the Defendants in the Federal Action in the form attached hereto. The said withdrawal of the Federal Action shall be with prejudice with respect to all past acts and allegations contained in the pleadings in said Federal Action. However, the Anginos do reserve the right, and the Township so agrees, to refer to the factual circumstances set forth in their present Federal Action in the event they should find it necessary to file a future cause of action against Middle Paxton Township, but any such reference shall be solely for purposes of showing a "course of conduct during an earlier period" and not for purposes of establishing damages arising out of said conduct. Any damages to which the Anginos shall be entitled shall be solely based upon new factual circumstances arising after the date of this Agreement.

D. *New Factual Circumstances Arising After the Date of the Settlement Agreement*

20. Since the date of the Settlement Agreement, Plaintiffs have been unsuccessful in obtaining Township approval with respect to a ten-lot subdivision located on approximately 90 acres of Plaintiffs' northern boundary adjacent to and west of Plaintiffs' Spa and Fitness Center adjacent to and north of Plaintiffs' "lodges."

21. For ten years, Plaintiffs have at great expense attempted to obtain approval of this ten-lot subdivision, but the Board, Davis, Ernico, Mette and Light-Heigel have conspired to preclude development for numerous illegal, arbitrary, and capricious reasons, including counting other land owned by Plaintiffs and others as "lots." The Township and the Board have imposed over the ten-year period numerous arbitrary, capricious, and unreasonable conditions. A copy of most recent denial is attached as **Exhibit 3.**

22. The Township and the Board have illegally treated Plaintiffs' property as a nonconforming commercial use rather than as a permitted recreation, golf, resort, retreat use and, as a result have limited overnight lodging accommodations to 50, precluded meeting spaces, and/or any expansion of dining and banquet facilities.

23. The Township and the Board denied Plaintiffs' occupancy of their lodges by insisting on occupancy permits after the time period for denying occupancy permits had expired, by illegally insisting upon an impermeable core with respect to a dam that had already been built under circumstances where there only would be 7 or 8 feet of water for a period of 7 or 8 hours once every 25 years, and persisting in denying the permits and/or denying approval of the development plans by imposing other "bad faith" restrictions.

24. In a companion case, *Angino, et al. v. Board of Supervisors of Middle Paxton Township*, No. 3459-S-1997 (Dauph. 1997), Judge Turgeon found the defendant township guilty of bad faith.

25. The Township and the Board have employed Defendant Light-Heigel & Associates, Inc. as the Township engineer, and at all times relevant hereto, the Township, the Board and Defendant Light-Heigel have conspired to deprive Plaintiffs of their federally protected rights.

26. Defendant Light-Heigel & Associates, Inc., in carrying out its role in zoning and planning decisions, have made recommendations to the Township and the Board which are not based on sound engineering principles but rather are made in order to further the low density/exclusion/anti-development policies and procedure of Defendant Township and Defendant Board.

27. Defendant Light-Heigel & Associates, Inc. has conspired with Defendant Township and Defendant Board to deny permits requested by Plaintiffs and deny approval of various development plans.

28. Defendant Light-Heigel & Associates, Inc. has participated with Defendant Township and Defendant Board in the creation of long-range plan and long-range zoning laws that have separated Plaintiffs from all other citizens of Middle Paxton Township.

29. Defendant Light-Heigel & Associates, Inc. has acted with Defendant Township and Defendant Board to propose zoning changes specifically directed at Plaintiffs in order to deprive Plaintiffs of the use and enjoyment of their land.

30. The Township and the Board have engaged Defendants Ernico and Mette, Evans & Woodside to frivolously initiate litiga-

tion with respect to the occupancy of the lodges causing great expense to Plaintiffs.

31. Defendants Ernico and Mette, Evans & Woodside have at all times relevant hereto conspired to deprive Plaintiffs of their federally protected rights.

32. Defendants Ernico and Mette, Evans & Woodside have, in cooperation with Defendant Township and Defendant Board, engaged in conduct to spend as much money as required to pursue a "legally defensible illegal anti-development exclusionary policy.

33. Defendants Ernico and Mette, Evans & Woodside, in furtherance of Defendant Township's and Defendant Board's desires, made decisions and provided legal advice with respect to Plaintiffs' property which is without basis in law and designed solely to intimidate Plaintiffs.

34. The Township, the Board and Defendants Ernico and Mette, Evans & Woodside illegally required bonding and adhesionary agreements and failed to cooperate in reducing bonding requirements. **Exhibit 4**

35. Defendants have persisted in treating Plaintiffs' commercial, recreational, and golf properties differently than similarly situated not-for-profit recreational facilities in direct violation of established law.

36. The Township, the Board and Defendants Ernico and Mette, Evans & Woodside require ten percent slopes for roads in a mountainous terrain contrary to state and federal fifteen percent and sixteen percent recommendations that has precluded and/or made exorbitantly expensive Plaintiffs' contemplated development.

37. Defendants, in their Long Range Plan and proposed zoning changes, have separated Plaintiffs from all other citizens, initially drew a map that divided zoning uses by Plaintiffs' property lines, are currently proposing zoning changes that are specifically directed to Plaintiffs, and have made specific decisions to limit, stop, and/or make prohibitively expensive Plaintiffs' contemplated development.

38. Defendants continue to treat Plaintiffs differently from other citizens by their arbitrary and capricious actions with respect to stormwater management, sewage, zoning, etc.

39. The Township and the Board have violated the Settlement Agreement by making demands not within the wording or contemplation of the Agreement.

COUNT I—42 U.S.C. §1983

40. Paragraphs 1 through 39 of this Amended Complaint are incorporated herein as if set forth at length.

41. Because of the conduct of Defendants, as more fully articulated above in paragraphs 15 through 38, Plaintiffs have been deprived of their federally protected rights, more specifically, their rights granted Plaintiffs under the Fifth and Fourteenth Amendments of the Constitution of the United States.

42. Plaintiffs were deprived of their federally protected rights by Defendants Van Wagner, Smith, Peffer, and Davis, in their individual capacities, who at all times relevant hereto were acting under color of state law.

43. Plaintiffs were deprived of their federally protected rights by Defendant Middle Paxton Township through the official acts of its governing body (Van Wagner, Smith and Peffer), and Defendant Middle Paxton Township is and was the motivating force behind the deprivations imposed upon Plaintiffs.

44. Plaintiffs were deprived of their federally protected rights by Defendants Ernico, Mette, Evans and Woodside, and Light-Heigel & Associates, Inc., who at all times relevant hereto were acting under color of state law.

45. As a result of Defendants' conduct in depriving Plaintiffs of their federally protected rights, Plaintiffs have sustained substantial damages including unnecessary expenses for engineering fees, inability to sell building lots, loss of business by the closing of the lodges, inability to expand and/or provide meeting rooms and appropriate banquet facilities, increased construction costs, bonding fees, hundreds of thousands of dollars of wasted marketing expenses, lost profits, and patron ill-will all resulting from Defendants' partial taking and illegal, arbitrary, and capricious actions, and claim is made therefor.

46. The action of the individual Defendants as described above are outrageous, intentional, and punitive and have been taken with reckless indifference toward Plaintiffs' rights, and claim is made therefor.

47. Plaintiffs have been forced to expend considerable attorney time and expense in defending and pursuing this and various other actions resulting from Defendants' violation of Plaintiffs' civil rights and Plaintiffs' pendant state causes of action, and claim is made therefor.

WHEREFORE, Plaintiffs request this Honorable Court to issue an Order against the Defendants:

a. entering judgment in favor of King Drive and the Anginos and against the Township, Township Supervisors, Ernico, Mette Evans, Davis and Light-Heigel for compensatory damages in excess of $75,000 for the violation of the Plaintiffs' federally protected rights;

b. entering judgment in favor of King Drive and the Anginos against the Van Wagner, Smith, Peffer, Ernico, Mette Evans, Davis and Light-Heigel for punitive damages reflective of the malicious, knowing, punitive and bad faith violation of the Plaintiffs' federally protected rights;

C. entering judgment in favor of King Drive and the Anginos against the Township, Township Supervisors, Ernico, Mette Evans, Davis and Light-Heigel for the costs of litigation, including reasonable attorneys' fees for the hundreds of hours that have been expended defending Plaintiffs' rights and pursuing actions.

d. Ordering the approval of Plaintiffs' ten-lot subdivision;

e. Issuing an "interpretative" opinion and order that Plaintiffs' proposed use of gardens, retreat, and golf course with necessary and accessory structures, such as overnight accommodations, meeting rooms, banquet facilities, conference center, etc. are appropriate uses of the 700 acres; and

f. Granting such other relief as this Court deems appropriate.

COUNT II—CIVIL CONSPIRACY
Plaintiffs v. Van Wagner, Smith, Peffer, Davis Ernico, Mette, Evans & Woodside and Light-Heigel & Associates, Inc.

48. Paragraphs 1 through 46 of this Amended Complaint are incorporated herein as if set forth at length.

49. As more fully described above, Defendants Van Wagner, Smith, Peffer, Davis, Ernico, Mette, Evans & Woodside and Light-Heigel & Associates, Inc. did act and continue to act with a common purpose to deprive Plaintiffs of their federally protected rights under the Constitution of the United States and the laws of the United States.

50. As more fully described above, Defendants Van Wagner, Smith, Peffer, Davis, Ernico, Mette, Evans & Woodside and Light-Heigel & Associates, Inc. did act overtly in pursuance of the common purpose designed to deprive Plaintiffs of their federally protected rights.

51. As a result of the conduct of Defendants Van Wagner, Smith, Peffer, Davis, Ernico, Mette, Evans & Woodside and Light-Heigel & Associates, Inc., Plaintiffs have sustained actual legal damages, including substantial unnecessary expenses for engineering fees, inability to sell building lots, loss of business by the closing of the lodges, inability to expand and/or provide meeting rooms and appropriate banquet facilities, increased construction costs, bonding fees, hundreds of thousands of dollars of wasted marketing expenses, lost profits, and patron ill-will all resulting from Defendants' partial taking and illegal, arbitrary, and capricious actions, and claim is made therefor.

52. The action of the individual Defendants as described above are outrageous, intentional, and punitive and have been taken with reckless indifference toward Plaintiffs' rights, and claim is made therefor.

53. Plaintiffs have been forced to expend considerable attorney time and expense in defending and pursuing this and various other actions resulting from Defendants' violation of Plaintiffs' civil rights and Plaintiffs' pendant state causes of action, and claim is made therefor.

WHEREFORE, Plaintiffs request this Honorable Court to issue an Order against the Defendants:

a. entering judgment in favor of King Drive and the Anginos and against the Township, Township Supervisors, Ernico, Mette Evans, Davis and Light-Heigel for compensatory damages in excess of $75,000 for the violation of the Plaintiffs' federally protected rights;

b. entering judgment in favor of King Drive and the Anginos against the Van Wagner, Smith, Peffer, Ernico, Mette Evans, Davis and Light-Heigel for punitive damages reflective of the malicious, knowing, punitive and bad faith violation of the Plaintiffs' federally protected rights;

c. entering judgment in favor of King Drive and the Anginos against the Township, Township Supervisors, Ernico, Mette Evans, Davis and Light-Heigel for the costs of litigation, including reasonable attorneys' fees for the hundreds of hours that have been expended defending Plaintiffs' rights and pursuing actions.

d. Ordering the approval of Plaintiffs' ten-lot subdivision;

e. Issuing an "interpretative" opinion and order that Plaintiffs' proposed use of gardens, retreat, and golf course with necessary and accessory structures, such as overnight accommodations, meeting rooms, banquet facilities, conference center, etc. are appropriate uses of the 700 acres; and

f. Granting such other relief as this Court deems appropriate.

Respectfully submitted
ANGINO & ROVNER, P.C.
/s/Richard C. Angino
Richard C. Angino, Esquire
I.D. No. 07140
4503 North Front Street
Harrisburg, PA 17110
Attorney for Plaintiffs

Dated: 4/12/00

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

No. 1:-CV-00-0086

Judge Yvette Kane

RICHARD C. ANGINO, et al.

Plaintiffs,

v.

J. THOMAS VANWAGNER, et al.

Defendants

JOINT MOTION TO DISMISS AMENDED COMPLAINT AND FOR A MORE DEFINITE STATEMENT

J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Middle Paxton Township, Jeffrey A. Ernico, Mette, Evans & Woodside, and Mary Jane Davis, by their attorneys, Thomas, Thomas & Hafer, LLP, Mette, Evans & Woodside, and McKissock and Hoffman, P.C., file this Motion to Dismiss Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and for more definite statement under Rule 12(e):

1. On or about January 17, 2000, Plaintiffs commenced this civil action by filing a complaint based upon various federal law claims, including the 5th and 14th Amendments, 42 U.S.C.A. §§1983 and 1985(3), and unspecified pendent state law claims.

2. J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, and Mary Jane Davis, (the "Middle Paxton Township Individual Defendants"), Middle Paxton Township, Jeffrey A. Ernico, and Mette, Evans & Woodside, filed a Motion to Dismiss and for a More Definite Statement which was joined by Defendant Light-Heigel & Associates.

3. On or about April 12, 2000, Plaintiffs filed an Amended Complaint.

4. In the Amended Complaint, Plaintiffs, *inter alia*, abandon their alleged 42 U.S.C.A. §1985(3) claim, restate their purported claims under 42 U.S.C.A. §1983 (Count I) and raise for the first time a claim for conspiracy to violate Section 1983 (Count II).

5. As a matter of law, the Amended Complaint does not overcome the deficiencies contained in the original complaint; as a result, it fails to state a cause of action against these Defendants for violation of 42 U.S.C.A. §1983.

6. Section 1983 provides a cause of action for individuals who are deprived of statutory or constitutional rights by someone acting under color of state law. 42 U.S.C.A. §1983.

7. Plaintiffs' claim, without specificity, is that their 5th and 14th Amendment rights have been violated.

8. A prerequisite for a 14th Amendment claim is that there are no adequate remedies under state law. Plaintiffs have failed to aver that there were no adequate remedies under state law.

9. A proper allegation of a procedural due process violation must contain "behavioral or structural allegations from which [the Court] can infer that [the] process was unconstitutional." *Rogin v. Bensalem*, 616 F.2d 680 (3d Cir. 1980) *cert. denied*, 450 U.S. 1029 (1981).

10. Plaintiffs have failed to make such allegations, nor can they, where Pennsylvania's procedures for challenging zoning ordinanees substantially conform with the due process guidelines enunciated by the Supreme Court. *Id.* at 695.

11. Plaintiffs' claim under the 5th Amendment is also fatally flawed where Pennsylvania provides adequate administrative remedies for a property owner who alleges that his property has been unlawfally taken and Plaintiffs have failed to aver that they pursued these remedies.

12. Accordingly, the Court should dismiss Count I of Plaintiffs' Amended Complaint.

13. Defendant Ernico as solicitor to the Board of Supervisors of Middle Paxton Township, represents that Board and provides advice and counsel to it; Defendant Ernico does not make policy or decisions.

14. Accordingly, Plaintiffs cannot bring a §1983 action against Defendant Ernico or his employer, Defendant Mette, Evans & Woodside, because of advice and counsel tendered to the Board.

15. Count II of the Amended Complaint alleges that the Defendants acted together in conspiracy to violate the Plaintiffs' civil rights.

16. Plaintiffs' conspiracy claim must be dismissed where the underlying Section 1983 count is not justiciable.

17. In the alternative, the specific facts required to support a claim for conspiracy are lacking and the count must be dismissed because the mere occurrence of a civil rights violation does not mean that a conspiracy to violate those rights also occurred.

18. Plaintiffs' Amended Complaint contains a claim for punitive damage against all individual Defendants in both Counts I and II.

19. The Middle Paxton Township Individual Defendants, in their official capacities, cannot be liable for punitive damages as a matter of law.

20. Accordingly, Defendants respectfully request the Court dismiss Plaintiffs' punitive damage claims against said parties.

21. All individual Defendants enjoy qualified immunity under federal law where the Amended Complaint has failed to allege that their conduct has violated clearly established constitutional law.

22. Although Plaintiffs identify various Defendants sued in this action and additional facts have been provided as to each Defendant, Plaintiffs' claims as now stated in the Amended Complaint still fail to differentiate the actions or omissions of each of the Defendants in Paragraphs 35, 37, and 38.

23. Pursuant to Rule 12(e), said Defendants are entitled to a more definite statement because Plaintiffs' state their claims in a vague, ambiguous and unintelligible fashion; because specifically, they charge all Defendants with acts for which all could not have possibly performed or be responsible.

WHEREFORE, J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Middle Paxton Township, Jeffrey A. Ernico, Mette,

Evans & Woodside, and Mary Jane Davis, respectfully request the Court to grant their joint motion and enter an order as follows:

a. Dismissing Plaintiffs' Amended Complaint as to 42 U.S.C.A. §1983;

b. Dismissing Count II of Plaintiffs' Amended Complaint;

c. Dismissing Plaintiffs' claims for punitive damages; and

d. In the alternative, directing Plaintiffs to file a Second Amended Complaint containing more definite statement of facts which form the basis of their claims against said Defendants.

Respectfully submitted,
McKISSOCK & HOFFMAN, P.C.
By: /s/Jeffrey P. Lewis
JEFFREY P. LEWIS, ESQUIRE
PA I.D. #27586
105 East Evans Street, Suite D
PO Box 3086
West Chester, PA 19381
Attorney for Defendants,
Jeffrey A. Ernico and Mette,
Evans & Woodside
AND
METTE, EVANS & WOODSIDE
By: /s/Kathryn L. Simpson
KATHRYN L. SIMPSON, ESQUIRE
PA I.D. #28960
3401 North Front Street
P. O. Box 5950
Harrisburg, PA 17110-0950
Co-Counsel for Defendants,
Jeffrey A. Ernico and Mette,
Evans & Woodside
AND

THOMAS, THOMAS & HAFER, LLP
By: /s/C. Kent Price
C. KENT PRICE, ESQUIRE
PA I.D. #06776
305 North Front Street
PO Box 999
Harrisburg, PA 17108-0999
Attorney for Defendants,
Jeffrey Smith, J. Thomas Van Wagner, Richard Peffer, and co-counsel for Jeffrey Ernico and Mette, Evans & Woodside

DATE: April 26, 2000

FILED
SCRANTON
OCT 30 2000
Per /s/Illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 3:CV-00-1555
ZIELINSKI v. BRETHREN MUTUAL
INSURANCE COMPANY

CIVIL ACTION NO. 3:CV-00-1305
PETERS v. PRINT-O-STAT INC., et. al.

CIVIL ACTION NO. 3:CV-00-0086
ANGINO, et al v. VAN WAGNER, et al.

ORDER

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1. The above captioned cases have been listed for Case Management Conferences to be held with counsel in chambers, Room 458, William J. Nealon Federal Building & U.S. Courthouse, 235 North Washington Avenue, Scranton, Pennsylvania.

2. The conferences shall be held on **December 13, 2000 as follows:**

3:CV-00-1555	**9:00 a.m.**
3:CV-00-1305	**10:00 a.m.**
3:CV-00-0086	**11:00 a.m.**

3. The purpose of this conference is to discuss all aspects of the case including possible simplification of issues, a schedule for the completion of discovery, amendment of pleadings, joinder of parties, filing of motions and trial. It is anticipated that discovery has been initiated and will be pursued with dispatch, including compliance with Fed.R.Civ.P. 26(a), so that a reasonable discussion of the merits will take place during the conference, as well as the

agreement upon a realistic trial schedule. The subjects for consideration at the Case Management Conference will also include those matters set forth in Fed.R.Civ.P. 16(b) and (c).

4. In accordance with Fed.R.Civ.P. 26(f) and Local Rule 16.3, lead counsel for each party shall, as soon as practicable, and in any event at least five (5) days prior to the Case Management Conference, meet and discuss in good faith the matters set forth in the Joint Case Management Plan, a copy of which is included in the local rules of court and may be obtained from the Clerk's office. The completed Joint Case Management Plan must be filed at least five (5) days prior to the Case Management Conference. Sanctions may be imposed if a party or a party's attorney fails to participate in good faith in the conference required by Fed.R.Civ.P. 26(f) and Local Rule 16.3(a). (See, e.g., Fed.R.Civ.P. 37(g)).

5. If the parties agree to refer this matter to a Magistrate Judge for Pre-Trial and Trial purposes, they should notify the Court in writing no later than three (3) days before the scheduled Case Management Conference, and the conference will be canceled. The case will then be referred to a Magistrate Judge who will reschedule the Case Management Conference. In accordance with Fed.R.Civ.P. 16(c) and Local Rule 16.2, at least one (1) of the attorneys for each party participating in the Case Management Conference shall be familiar with the case; shall have authority to enter into stipulations and to make admissions regarding all matters that the parties reasonably anticipate may be discussed; and shall have complete settlement authority. If an attorney does not have complete settlement authority, the party or person with full settlement authority shall be available by telephone. Counsel is responsible for notifying the person with settlement authority of the requirements of Local Rule 16.2 as well as the date of the Case Management Conference.

6. Counsel should be familiar with the Expense and Delay Reduction Plan adopted by the United States District Court for the Middle District of Pennsylvania, and are expected to comport themselves in a manner intended to secure the just, speedy and inexpensive determination of this action.

7. No document may be faxed to chambers or to the clerk's office. The Court will take no action based on facsimile documents.

8. The Court will take no action based on correspondence. Counsel must adhere to the motion practice set forth in the rules.

/s/A. Richard Caputo
A. Richard Caputo
United States District Judge

Date: October 27, 2000

FILED
SCRANTON
OCT 09 2001
PER /s/illegible
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 3:CV-00-0086

(JUDGE CAPUTO)

RICHARD C. ANGINO, ET AL.,

Plaintiffs,

vs.

J. THOMAS VAN WAGNER, ET AL.,

Defendants.

ORDER

NOW, this 9th day of October, 2001, upon consideration of Petition to File a Second Amended Complaint (Doc. 40), IT IS HEREBY ORDERED:

1. Plaintiffs' Petition to File a Second Amended Complaint (Doc. 40) is **granted,** and in accordance with L.R. 15.1(a), the Clerk of Court is directed to detach and file the original Second Amended Complaint currently attached to the Petition to File a Second Amended Complaint (Doc. 40) as Exhibit "1".

2. Defendants shall file their responses to the Second Amended Complaint within twenty (20) days of the date of this Order.

/s/A. Richard Caputo
A. Richard Caputo
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT COURT OF
PENNSYLVANIA

CIVIL ACTION—LAW

NO. 1:CV-00-0086

JUDGE CAPUTO

JURY TRIAL DEMANDED

RICHARD C. ANGINO, ALICE K. ANGINO,
and KING DRIVE CORP.,

Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Defendants

SECOND AMENDED COMPLAINT

I—*JURISDICTION AND VENUE*

1. This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1343(a) and principles of pendant jurisdiction.

2. Venue is proper in this district under 28 U.S.C. §1391(b) because all Defendants reside in this district, a substantial part of the events or omissions giving rise to the claims set forth herein occurred in this district, and the property that is the subject of the action is situated in this district.

II—*THE PARTIES*

3. Plaintiffs Richard C. Angino and Alice K. Angino (hereinafter "Anginos") are adult individuals whose address is 2040 Fishing Creek Valley Road, Harrisburg, Pennsylvania 17112.

4. Plaintiff King Drive Corp. (hereinafter "King Drive"), is a Pennsylvania Corporation, with its business address at 4503 North Front Street, Harrisburg, Pennsylvania 17110.

5. Defendant Middle Paxton Township (hereinafter "Township"), is a township of the first class, duly organized under the laws of the Commonwealth of Pennsylvania, with offices at 1304 Overlook Street, P.O. Box 277, Dauphin, Pennsylvania 17018.

6. Defendant Thomas J. VanWagner (hereinafter "VanWagner"), a Township Supervisor at all times relevant to this Complaint, is an adult individual with a principal mailing address of 3111 Clarks Valley Road, Dauphin, Pennsylvania 17018.

7. Defendant Jeffrey Smith (hereinafter "Smith"), a Township Supervisor during some of the times relevant to this Complaint, is an individual with a principal mailing address of 1751 Stony Creek Road, Dauphin, Pennsylvania 17018.

8. Defendant Richard Peffer (hereinafter "Peffer"), a Township Supervisor at all times relevant to this Complaint, is an adult individual with a principal mailing address of 115 Riverview Road, Dauphin, Pennsylvania 17018.

9. The Defendant Supervisors are members of the Defendant Board of Supervisors (hereinafter collectively the "Board") which is the governing body of the Township. This action is brought against Defendant Supervisors in both their personal and official capacities.

10. Defendant Mary Jane Davis, the Township Enforcement Officer at all times relevant to this Complaint, is an adult individual with a principal mailing address of 1304 Overlook Street, Dauphin, Pennsylvania 17018. This action is brought against her in both her personal and official capacity.

11. Defendant Mette, Evans & Woodside, P.C. (hereinafter "Mette Evans") is a Pennsylvania Professional Corporation with a

business address at 3401 N. Front Street, Harrisburg, Pennsylvania 17110.

12. Defendant Jeffrey A. Ernico, Esquire (hereinafter "Ernico"), the Township Solicitor, at all times relevant to this Complaint, is an adult individual with a principal mailing address of 701 Grantham Road, Grantham, Pennsylvania. This action is brought against him in both his personal and official capacity.

13. At all times relevant to this Complaint, Ernico was a servant, agent, apparent agent, and/or employee of Mette Evans and was acting within the course and scope of his employment by Mette Evans.

14. Defendant Light-Heigel hereinafter "Light-Heigel") is an engineering firm licensed to do business in the Commonwealth of Pennsylvania and having its principal place of business located at 430 East Main Street, Palmyra, Pennsylvania.

III—*FACTUAL BASES FOR RELIEF*

A. *The Property*

15. The Anginos directly or through King Drive are the equitable and legal owners of approximately 700 acres (more than one square mile) of land on Fishing Creek Valley Road, Middle Paxton Township, Pennsylvania.

16. Fishing Creek Valley Road is a state highway, and its western end is approximately six miles from the City of Harrisburg.

17. With the completion of Rt. 322/22, Middle Paxton Township and particularly Fishing Creek Valley Road are in a prime location for residential development.

18. The Anginos from the beginning purchased their 700 acres with the plan to sell lots and have at a great expense of time and money attempted to obtain approval from Defendants to sell lots.

19. The Anginos developed, and marketed over the past 30 years at great expense of time and money commercial "gardens," a "resort," "retreat," "golf course," "spa and fitness center."

B. *Prior Lawsuit*

20. Plaintiffs previously filed a civil rights lawsuit against many of the same Defendants to No. 1-CV-97-1265, Vanaskie, J., alleging various constitutional violations and other illegal actions. Copy

of Amended Complaint in the prior lawsuit was attached to the original Complaint and Amended Complaint in the instant action.

C. *Settlement and Discontinuance of Prior Action*

21. The parties entered into a Settlement Agreement on March 16, 1998, which settled and resolved the then-pending legal actions. Copy of Settlement Agreement was attached to prior Complaint and Amended Complaint in the instant action.

22. The Settlement Agreement provided:

> 2.6.1 The Anginos agree to withdraw their pending Federal Action which is in the nature of a federal Civil Rights action against the Township, its elected and appointed officials and to execute a Release of all of the Defendants in the Federal Action in the form attached hereto. The said withdrawal of the Federal Action shall be with prejudice with respect to all past acts and allegations contained in the pleadings in said Federal Action. However, the Anginos do reserve the right, and the Township so agrees, to refer to the factual circumstances set forth in their present Federal Action in the event they should find it necessary to file a future cause of action against Middle Paxton Township, but any such reference shall be solely for purposes of showing a "course of conduct during an earlier period" and not for purposes of establishing damages arising out of said conduct. Any damages to which the Anginos shall be entitled shall be solely based upon new factual circumstances arising after the date of this Agreement.

D. *New Factual Circumstances Arising After the Date of the Settlement Agreement*

23. Since the date of the Settlement Agreement, Defendants have violated Plaintiffs' constitutional rights and have been guilty of bad faith actions with respect to Plaintiffs' attempts to sell building lots and/or otherwise develop Plaintiffs' resort.

24. Commencing in 1988, Defendants collaborated with respect to adopting zoning and land development amendments, the 1998 Comprehensive Plan, the 2000 Zoning Ordinance, a proposed new Subdevelopment Ordinance and have interpreted the amend-

ments and new statutes so as to essentially preclude the development of Plaintiffs' land with respect to selling lots and/or developing the Plaintiffs' resort.

25. With respect to land development, the zoning and subdivision laws in effect in 1987 in Middle Paxton Township would have permitted at least 400-500 lots plus Plaintiffs' resort on Plaintiffs' 700 acres on the basis that houses could be built and lots sold on one-acre lots in Plaintiffs' residential/agricultural zoning district and Plaintiffs' resort developed as a recreational use.

26. In 1986/87, Stan Custer obtained initial approval in the same residential/agricultural zoning district as Plaintiffs for the first phase of a 76-lot subdivision, Fishing Creek Estates, situated on approximately 108 acres of land.

27. At or about the same time, Cameron Geisel also in the same zoning district obtained approval for a development that under the then-existing law which permitted one-acre lots.

28. Stan Custer was successful with respect to his 108-acre, 76-lot subdivision to also obtain approval from Middle Paxton Township to utilize an on-site sewage package treatment plant, construct driveways that exceed 20%, and built a public access road that exceeded 10%.

29. Cameron Geisel was successful in obtaining a waiver from the 500 feet cul-de-sac limitation in effect at the time to construct a 1,280 feet dead end public street.

30. Both the Geisel and Custer developments are situated relatively near to Plaintiffs' property and share similar mountainside terrain.

31. In the 1970s and 1980s, other owners of property and developers in the same agricultural/residential zoning area of fishing Creek Valley were permitted to develop their properties on one-acre lots without steep slope restrictions with reasonable waivers or variances of applicable ordinances and without an interpretation of "lots" that included land owned by others, residual acreage, land devoted to septic systems, and lots already existing along the road leading to the proposed new development.

32. Following the engagement of a planning firm, Dresdner Associates to develop a comprehensive plan, the 1987 Dresdner Comprehensive Plan suggested that the Township develop a steep slope zoning ordinance which would classify steep slopes as 20% or greater and mandate minimal two-acre lots for steep slopes classified as 20% or greater. The Dresdner Comprehensive Plan also suggested incidental, substantive, and procedural requirements for steep slope lot development.

33. Ignoring the Dresdner comprehensive plan's definition of 20% for steep slopes and the substantive and procedural incidental prerequisites, Defendants and their agents arbitrarily in early 1988 collaborated and adopted a steep slope ("severe slope") ordinance *defining steep (severe) slopes as 15% or greater rather than the 20% which was in the Comprehensive Plan*, but still mandated two-acre minimum lots, and omitted all of the other incidental substantive and procedural Dresdner Comprehensive Plan prerequisites.

34. Shortly following the 1988 zoning amendment of 15% and two acres, Defendants again collaborated to pass a second amendment to the zoning ordinance and this time arbitrarily and without rational or legal bases defined steep or severe slopes as being 12%, 15%, and 18% and required three, five, and ten acres, respectively, for each lot. Again, the Dresdner comprehensive plan recommendations for procedural and substantive elements were ignored and omitted from the second severe slope ordinance.

35. Over a course of three decades from 1962-1990, Middle Paxton Township proceeded to demand more and more land for building lots requiring first 15,000 square feet, then 22,500 square feet, then one-acre minimum lot sizes and then three, five, and ten acres for steep or severe slope lots defined as 12%, 15%, and 18%, respectively.

36. In 1995/96, a comprehensive plan committee was formed, and a planning firm, The Waetzman Planning Group, was engaged to develop another ten-year comprehensive plan.

37. As a result of questionnaires circulated, comments at public meetings, and discussions as recorded in minutes of the public

meetings and comprehensive plan committee meetings, the vast majority of the residents of Middle Paxton Township expressed concern as to the completion of 22/322 passing through Middle Paxton Township and a desire to develop a comprehensive plan and zoning ordinance to preclude and/or severely limit development.

38. Defendants collaborated through the adoption of a Comprehensive Plan in 1998 and Zoning Ordinance to greatly restricted future development in Middle Paxton Township generally and Fishing Creek Valley particularly.

39. Plaintiffs' property was singled out in the 1998 Comprehensive Plan and 2000 Zoning Ordinance to preclude or at least greatly restrict development of Plaintiffs' 700 acres.

40. As part of the development of the comprehensive plan, maps for proposed zoning were prepared and submitted at public hearings for review.

41. One of the first maps prepared illustrated a dividing line of low density and agricultural/residential very low density which coincided with the western boundary of Plaintiffs' land.

42. When Plaintiff Richard Angino objected at the public meeting to the very low density, the planners later changed the map to coincide with Plaintiffs' eastern boundary.

43. When the actual uses were promulgated, the fixing of Plaintiffs' western boundary as a demarcation between low density and agricultural residential very low density resulted in Plaintiffs' resort became a nonconforming use. Following Plaintiffs' objection, the boundary line separating low density from agricultural/residential very low density was again redrawn with the new boundary line to the west and no longer coinciding with Plaintiffs' western boundary line.

44. Plaintiffs were also singled out in the zoning questionnaires, interviews, and meetings where the Anginos were mentioned over and over and described by Solicitor Ernico as a "problem."

45. Defendant Smith, Chair of the Board of Supervisors, stated at a public meeting that the Supervisors, not the Comprehensive Planning Committee or the planning consultants, would eventu-

ally determine the final comprehensive plan and final zoning boundary lines and Defendants arbitrarily on various occasions ignored the recommendations of the committee and the consultants.

46. As a result of Defendants' anti-development "legally defensible" comprehensive plan and the zoning ordinance that followed in 2000 implementing the comprehensive plan, a significant portion of Middle Paxton Township and much of Rt. 443 Fishing Creek Valley Road and all of Plaintiffs' 700 acres were all classified as agricultural/residential very low density

47. Defendants arbitrarily designated portions of Fishing Creek Valley Road as low density or medium or high density when in reality the area had already been developed as very low density.

48. Contrary to the Municipal Planning Code's recommendations that municipalities consult with each other and with the county and their existing plans and ordinances as to proposed comprehensive plans and zoning ordinances in order to develop consistent plans in the district, Middle Paxton Township's comprehensive plan and zoning ordinance classifies as low, medium, and high density areas that have not only been developed as low density but areas that are in steep slope regions, and the Fishing Creek Valley designated area of low density does not follow the recommendations of the 1992 Dauphin County Comprehensive Plan.

49. The 1992 Dauphin County Comprehensive Plan classified all of the low lying of Fishing Creek Valley, including the low-lying areas of Plaintiffs' property as low density, but the Middle Paxton Township Comprehensive Plan and Zoning Ordinance arbitrarily and without rational or legal bases classifies all of Plaintiffs' 700 acres as very low density.

50. Plaintiffs' 700 acres are the first major geographical area east of the river that would lend itself to a significantly large low density (one house or lot per acre) development, but Defendants' 1998 Comprehensive Plan and 2000 Zoning Ordinance require at least three acres per lot.

51. Both the 1998 Comprehensive Plan and the 2000 Zoning Ordinance further limit development of Plaintiffs' 700 acres by a

steep slope overlay that mandates three acres for 12% slopes, five acres for 15% slopes, and ten acres for 18% or greater slopes.

52. The Dauphin County 1992 Comprehensive Plan does not recommend that *any* area in Middle Paxton Township be classified as agricultural for long-term planning, and yet Middle Paxton Township has reserved much of the entire Township and Fishing Creek Valley and Plaintiffs' 700 acres for future agricultural, very low density use (one house per three acres).

53. The soils in Fishing Creek Valley are not by any sense of the word prime agricultural land and actually constitute poor soils with little top soil and mainly shaley conditions, which has resulted in the abandonment of the few farms that once existed along Fishing Creek Valley Road.

54. Defendants had no basis whatsoever for classifying the area around Plaintiffs' 700 acres as "agricultural" since there is no existing agricultural use or anticipated agricultural use in the region, but rather the "agricultural" designation was adopted specifically to preclude or severely limit development.

55. The highest and best use of Plaintiffs' land would be low density housing and resort use.

56. Defendants' concerted actions which resulted in the vast bulk of Fishing Creek Valley Road and all of Plaintiffs' 700 acres as being classified as agricultural/residential, very low density, three-acre minimums was done to preclude development, rather than realistically evaluate future use, and in doing so has deprived Plaintiffs of the highest and best use of their land.

57. Defendants have admitted that they planned for Middle Paxton township ton continue as sparsely populated, rural "bedroom community" and continue as one of the least dense of the townships in Dauphin County.

58. Defendants' Solicitor admitted in response to a concern from the chief planner from the Waetzman Group, Mr. Guttenplan, that he recognized that 80% of Middle Paxton Township would be subject to constitutional challenge. Ernico's letter of October 27, 1997, in response to Guttenplan's letter dated October 22, 1997, are attached as **Exhibits A and B,** respectively.

59. The 1998 Comprehensive Plan by The Waetzman Planning Group, like its predecessor the 1987 Comprehensive Plan by Dresdner, classified steep slopes as 20% or greater and included in the Dresdner 1987 Comprehensive Plan a map showing steep slopes of 20% or greater. **Exhibit C.**

60. The 1992 Comprehensive Plan of Dauphin County classified steep slopes as 25% or greater. The map from the 1992 Dauphin County Plan showing steep slopes classified as 25% or greater is attached as **Exhibit D.**

61. Adjoining Lower Paxton Township's Comprehensive Plan and Zoning Ordinance classified precautionary steep slopes as 15-25% and prohibitive steep slopes as 25% or greater and permitted the construction of single family houses on one-acre lots. Pertinent portions of the Lower Paxton Township Comprehensive Plan and Zoning Ordinance are attached as **Exhibits E and F,** respectively.

62. Lower Paxton Township, Susquehanna Township, and all of the other townships contiguous with Middle Paxton Township permit single acre lots with respect to slopes up to 25% for single family houses.

63. Contrary to the definition of steep slopes of 20% or 25% as referenced in the Dresdner's 1987 Comprehensive Plan, Waetzman's 1998 Comprehensive Plan, Dauphin County's 1992 Comprehensive Plan, the 25% definition suggested by Mr. Koch the Gannett Fleming planner for the 2000 Zoning Ordinance, Lower Paxton Township's Comprehensive Plan and Zoning Ordinance, and the comprehensive plans of all other adjacent townships, boroughs, and municipalities, Defendants developed as part of the 1998 Comprehensive Plan and adopted in 2000 a zoning law with the definition of steep slopes as being 12%, 15%, and 18% and requiring three, five, and ten acres per lot.

64. Being an overlay, the steep or severe slope ordinance of Middle Paxton Township makes the low, medium, and high density areas of Fishing Creek Valley illusory and with the three acre agricultural minimum plus three, five, and ten are severe slope requirements, Defendants have successfully precluded development of Plaintiffs 700 acres.

65. Defendants have pursued their arbitrary and capricious, discriminatory actions in the past decade and particularly through the 1998 Comprehensive Plan and 2000 Zoning Ordinance in the face of Supreme Court decisions in 1965, 1969, 1970, and other Pennsylvania appellate decisions in the 1980s and 1990s declaring unconstitutional, exclusionary zoning that required two, three, five, and ten-acre lots.

66. Middle Paxton Township has also by its cul-de-sac length requirements (500 later becoming 800 feet), its road grade maximum of 10%, and radius of 150 feet made Plaintiffs' development of their property financially impossible.

67. The two principal engineering groups in the country with respect to Pennsylvania Development: the American Association of State Highway and Transportation Officials (AASHTO) and PennDOT suggest no restrictions on cul-de-sac length and permit 15% and 16% to road grades.

68. In addition to depriving Plaintiffs of their constitutional right to develop their property, Defendants have interpreted the existing laws in such a way as to classify a resort and gardens as a motel/hotel use, have defined "lot" contrary to the definitions in their own ordinances by including parcels of land owned by others, land use for septic systems, residual land, etc.

69. Defendants have refused to permit variances and waivers appropriate for the circumstances, such as cul-de-sac length, radius, and side slopes, while permitting variances and waivers to others similarly situated.

70. Defendants have demonstrated their singling out of Plaintiffs by their discriminatory actions with respect to land grading, building permits, closing down Plaintiffs' Italian Garden restrooms, taking Plaintiffs to District Judges and to Court, requiring expensive sifting of buried material, requiring a camera to be utilized to determine the path of installed drainage pipe, the reporting of minimal and technical violations, the placing of Plaintiffs' properties on holding tanks, etc.

71. Defendants have been found guilty of bad faith by Judge Turgeon which was affirmed by the Commonwealth Court with

respect to Defendants' actions pertaining to the handling of surface water for Plaintiffs' lodges, which constitutes collateral estoppel in the instant action.

72. Defendants' insistence on 10% road grades and 12%, 15%, and 18% slopes with corresponding three, five, and ten acres in the Mockingbird Extended development was determined by the Arbitrator who previously participated as a mediator as contrary to the parties Settlement Agreement.

73. Defendants' denial of Plaintiffs' requested package treatment plant was reversed by the Dauphin County Trial Court.

74. Defendants' closure of Plaintiffs' Italian Garden restroom was reversed by the District Judge.

75. Defendants and Defendants' Solicitor through additional litigation closed Plaintiffs' lodges while seeking attorneys' fees and expenses of approximately $80,000 which was clearly exorbitant and so found by the Trial Court.

76. Defendant Solicitor Ernico at one time had 16 or 17 township clients, but for the past decade has principally one, Middle Paxton Township, and has utilized litigation generally and litigation with Plaintiffs particularly as a means for him and his firm to obtain billable hours.

77. Defendants have refused Plaintiffs' requests for expansion of Plaintiffs' resort for meeting rooms and dining facilities on the basis that same constituted impermissible commercial uses and have inconsistently required or not required subdivision plans with respect to additions. Incredibly, no plans were required when Defendants classified Plaintiffs' resort as a nonconforming use, but plans are now required at a time when Defendants permit "resorts." Plans were also not required with respect to the prior expansion of Plaintiffs' restaurant but now required with respect to the expansion of the restaurant; not previously required with two expansions of the spa which is in a steep slope area but now required with the restaurant where there is no steep slope issue.

78. Defendants have arbitrarily demanded numerous versions of plans for technicalities at great expense for technicalities.

79. Over the past ten years, Defendant Supervisors over and over again, have refused to follow the recommendations of their Planning Commission with respect to Plaintiffs' 1990/91 proposed four-lot subdivision, a 1998 ten-lot subdivision, and a proposed 2000/2001 Mockingbird subdivision.

80. Defendants have persisted in their illegal, discriminatory constitutionally violative practices to the time of the preparation of this Second Amended Complaint by:

a. Attempting to require that an existing bridge on Straw Hollow Road be improved as a condition precedent of approval required even though this condition was specifically waived in the 1998 settlement agreement and yet at the same time refusing to spend money to improve a more deficient, similar bridge on Potato Valley Road;

b. Refusing to consider a waiver of Straw Hollow width to 16 feet or 18 feet to save dozens of mature trees and preserve a steep bank by contending that it might show favoritism to Plaintiffs;

c. By requiring 22 feet for the existing 10 feet wide Straw Hollow Road rather than 16 or 18 feet when Rt. 443 is only 18-20 feet wide, and the vast majority of Defendants' streets are 18-20 feet and none of Defendants' streets except in recent developments paid for by developers exceed 22 feet;

d. Although Defendants have $1.7 million and are in the black, Defendants have not included any major capital improvements in the 1998 ten-year Comprehensive plan to upgrade substandard roads and bridges contending that they are existing roads and bridges and contending that townships need not improve existing roads and bridges;

e. Although expressed as goals in their 1998 Comprehensive Plan the desire to continue with the existing circulatory or road system, Defendants mandate in their 2000 Zoning Ordinance that Plaintiffs and other proposed developers build roads and streets substantially wider than the existing state and township roads;

f. Defendants have stated in their 1998 Comprehensive Plan that development should not be permitted where the circulatory system is inadequate, have classified the present circulatory system as inadequate, proposed to spend no money to improve the circulating systems and thus have used this goal of the Comprehensive Plan to preclude development.

g. At the August 2, 2001 Supervisors meeting attended by Defendant Supervisors, Solicitor, and Engineer a set back waiver was given to Mette Evans' client Verizon, but a similar requested waiver to Plaintiffs had previously been denied;

h. Defendant Supervisor Van Wagner stated at the August 2, 2001, meeting that permitting waivers to Plaintiffs would be improper because waivers had not been given to others, which was untrue in some instances, but more importantly, waivers should be given when appropriate, and it is improper to refuse waivers in all circumstances. His view was echoed by Supervisor Smith'

i. Also at the August 2, 2001, meeting Supervisor Smith stated his position that there is nothing inconsistent about requiring 30, 32, or 36 feet widths for new developments but refusing to spend any of its $1.7 million to improve existing 16, 18, 20, and 22 feet wide major arteries and defective bridges; and

j. Supervisor Smith has on numerous occasions stated that cost is not a factor in demanding 100% compliance with all ordinances under all circumstances.

42 U.S.C. §1983

Due Process—Equal Protection

Pennsylvania Constitutional Violations

81. Paragraphs 1 through 80 of this Second Amended Complaint are incorporated herein as if set forth at length.

82. Because of the conduct of Defendants, as more fully articulated above, Plaintiffs have been deprived of their federally protected constitutional due process and equal protection rights and other property rights granted by the Federal and State Constitutions and their laws.

83. Plaintiffs have been deprived of their federally protected rights by Defendants Van Wagner, Smith, Peffer, Davis, and all other named Defendants in their individual and official capacities, who at all times relevant hereto were acting under color of state law, and all are, therefore, individually liable as well as the entities they represent. As a result of Defendants' conduct in depriving Plaintiffs of their federally protected rights, Plaintiffs' approximately 700 acres which would have provided 400-500 lots with a gross value of at least $75,000 and a net value after all expenses of $50,000 per lot or $20-$25 million 400-500 lots now have a value of at most $2.5-$3.0 million (potentially 40-50 lots at $50,000 per lot) or a total loss approximating $20 million.

84. As a farther result of Defendants' conduct in depriving Plaintiffs of their federally protected rights, Plaintiffs have sustained additional substantial damages, including unnecessary expenses for engineering fees, lost profits to the resort, and many thousands of hours of individual Plaintiffs' professional time.

85. The action of the individual Defendants as described above are outrageous, intentional, and punitive and have been taken with reckless indifference toward Plaintiffs' rights, and claim is made therefor.

86. Plaintiffs have been forced to expend considerable attorney time and expense in defending and pursuing this and various other actions resulting from Defendants' violation of Plaintiffs' civil rights and Plaintiffs' pendant state causes of action, and claim is made therefor.

WHEREFORE, Plaintiffs seek compensatory, punitive, and attorney fee damages in excess of $25,000,000.

Respectfully submitted
ANGINO & ROVNER, P.C.
/s/Richard C. Angino
Richard C. Angino, Esquire
I.D. No. 07140
4503 North Front Street
Harrisburg, PA 17110
Attorney for Plaintiffs

Dated: _____

FILED
SCRANTON
OCT 22 2001
PER /s/illegible
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 3:CV-00-0086

(JUDGE CAPUTO)

RICHARD C. ANGINO, ET AL.,
Plaintiffs,
vs.
J. THOMAS VAN WAGNER, ET AL.,
Defendants.

SECOND AMENDED
CASE MANAGEMENT ORDER

NOW, this 19th day of October, 2001, after having a conference call with counsel in this matter on October 18, 2001, IT IS HEREBY ORDERED that the Amended Case Management Order dated August 10, 2001 is further amended as follows:

1. Defendant shall comply with the requirements of Fed. R. Civ. P. 26(a)(2) with respect to expert witnesses not later than **November 26, 2001.**

2. Supplemental expert reports shall be due **December 9, 2001.**

In all other respects, the Amended Case Management Order dated August 10, 2001 remains in full force and effect.

/s/A. Richard Caputo
A. Richard Caputo
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION—LAW

NO. 1:CV-00-0086

JURY TRIAL DEMANDED

RICHARD C. ANGINO, ALICE K. ANGINO and KING DRIVE CORP.,

Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO, METTE, EVANS & WOODSIDE, P.C., MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer, and LIGHT-HEIGEL & ASSOCIATES, INC.,

Defendants

AMENDED ANSWER PRESENTING DEFENSES OF DEFENDANTS JEFFREY A. ERNICO, ESQUIRE, Individually and as Solicitor to the Supervisors of Middle Paxton Township, and METTE, EVANS & WOODSIDE, P.C.,

JEFFREY A. ERNICO, ESQUIRE and METTE, EVANS & WOODSIDE, P.C., by their counsel, McKissock & Hoffman and Mette, Evans & Woodside, file the following Amended Answer Presenting Defenses to Plaintiffs' Second Amended Complaint:

FIRST DEFENSE

The Second Amended Complaint fails to state a claim against Jeffrey A. Ernico and/or Mette, Evans & Woodside upon which relief can be granted.

SECOND DEFENSE

Jeffrey A. Ernico and Mette, Evans & Woodside admit the allegations contained in paragraphs 2-8, 11, 15, 21, 26, 36, and 40

of the Second Amended Complaint; allege that the allegations in paragraphs 14, 45, and 80 h., i., and j. refer to other defendants and require no response from these defendants; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17 or 19; admit that the documents identified in paragraphs 59-61 are attached to the Second Amended Complaint but deny the remaining averments in those paragraphs as the documents are in writing and speak for themselves; and deny each and every other allegation contained in the Second Amended Complaint.

THIRD DEFENSE

Neither Jeffrey A. Ernico nor Mette, Evans & Woodside, as solicitor to the Board of Supervisors, had the power, authority or ability to act on their own behalf with respect to the Township's planning, zoning, or land use ordinances or policies, or interpretation or enforcement of ordinances with respect to plaintiffs' property.

FOURTH DEFENSE

The answering defendants have not deprived or engaged in conduct intended to deprive plaintiffs of their federally protected rights.

FIFTH DEFENSE

The answering defendants have not deprived or engaged in conduct intended to deprive plaintiffs of their state protected rights.

SIXTH DEFENSE

The answering defendants have not conspired or engaged in conduct, together or with others, intended to deprive plaintiffs of their federally or state protected rights.

SEVENTH DEFENSE

The answering defendants have not violated or breached terms of the Settlement Agreement entered in the 1997 civil rights action referenced in plaintiffs' Second Amended Complaint.

EIGHTH DEFENSE

The answering defendants have not imposed arbitrary, capricious or unreasonable conditions upon the development of plaintiffs' land.

NINTH DEFENSE

The answering defendants have acted in accordance with applicable ordinances, the Municipalities Planning Code and sound engineering and land development principles in rendering advice to the Supervisors concerning the development of plaintiffs' land.

TENTH DEFENSE

Plaintiffs have adequate remedies under state law which they have failed to exhaust.

ELEVENTH DEFENSE

Plaintiffs' Second Amended Complaint fails to set forth any racial or class-based animus to support a cause of action under 42 U.S.C.A. Sec. 1905(3).

TWELFTH DEFENSE

The Second Amended Complaint fails to set forth causes of action upon which punitive damages may be awarded.

THIRTEENTH DEFENSE

Punitive damages may not be awarded against Middle Paxton Township, the Middle Paxton Township Board of Supervisors or the individual Defendants in their official capacities.

FOURTEENTH DEFENSE

The individual defendants are entitled to qualified immunity.

FIFTEENTH DEFENSE

The Second Amended Complaint fails to set forth a cause of action based upon conspiracy against answering defendants acting as solicitor to the Board of Supervisors.

SIXTEENTH DEFENSE

Answering defendants, acting as solicitor to the Board of Supervisors, cannot conspire with their client.

SEVENTEENTH DEFENSE

Answering defendants are immune under the Noerr-Pennington doctrine.

EIGHTEENTH DEFENSE

Plaintiffs lack standing to assert any claim against defendants Ernico and Mette, Evans & Woodside.

NINETEENTH DEFENSE

Plaintiffs' alleged claims are not ripe for hearing before this tribunal.

TWENTIETH DEFENSE

Defendants Ernico and Mette, Evans & Woodside are private entities and, therefore, cannot and have not acted under color of state law.

TWENTY-FIRST DEFENSE

As a result of the settlement agreement in the 1997 civil rights action referenced in plaintiffs' Second Amended Complaint, the answering defendants are released from many of plaintiffs' claim for damages.

TWENTY-SECOND DEFENSE

Defendants Ernico and Mette, Evans & Woodside did not participate in the preparation and enactment of an amendment to the Middle Paxton Township Zoning Ordinance in 1998 defining steep slopes as described in Paragraph 33 of the Second Amended Complaint.

TWENTY-THIRD DEFENSE

Defendant Ernico provided legal counsel and advice with respect to the amendments to Middle Paxton Township Zoning Ordinance in 1991 regarding defining slopes and requiring certain minimum lot areas in connection therewith as alleged in Paragraph 34 of the Second Amended Complaint but did not enact such ordinance. Defendant Ernico was not employed by Mette, Evans & Woodside at that time.

TWENTY-FOURTH DEFENSE

Defendants Ernico and Mette, Evans & Woodside did not participate in the preparation and enactment of any amendments to Middle Paxton Township Zoning Ordinance with respect to minimum lot areas described in Paragraph 35 of the Second Amended Complaint.

TWENTY-FIFTH DEFENSE

Defendants Ernico and Mette, Evans & Woodside did not participate in the preparation and enactment of Comprehensive Plan in 1998 by Middle Paxton Township.

TWENTY-SIXTH DEFENSE

Defendants Ernico and Mette, Evans & Woodside did not participate in the preparation and enactment of Zoning Ordinance in 2000 by Middle Paxton Township.

TWENTY-SEVENTH DEFENSE

Defendants Ernico and Mette, Evans & Woodside did not participate in the preparation and enactment of any amendments to the Middle Paxton Township Zoning Ordinance with respect to minimum road grade percentage.

TWENTY-EIGHTH DEFENSE

Some or all of plaintiffs' claims are barred by the applicable statute of limitations.

TWENTY-NINTH DEFENSE

At all times, answering defendants have properly carried out their duties as solicitor to the Board of Supervisors pursuant to the terms of the Second Class Township Code.

THIRTIETH DEFENSE

Plaintiffs have no right to attorney's fees in the event of a successful verdict.

WHEREFORE, Jeffrey A. Ernico and Mette, Evans & Woodside demand judgment in their favor and against Plaintiffs.

Respectfully submitted,
METTE, EVANS & WOODSIDE,
P.C.
/s/Kathryn L. Simpson
Kathryn L. Simpson, Esquire
PA I.D. # 28960
3401 North Front Street
P.O. Box 5950
Harrisburg, PA 17110-0950

McKISSOCK & HOFFMAN, P.C.
Jeffrey P. Lewis, Esquire
105 East Evans Street
P.O. Box 3086
West Chester, PA 19381

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

NO. 1:-CV-00-0086

JUDGE CAPUTO

RICHARD C. ANGINO, ALICE K. ANGINO and KING DRIVE CORP.

Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C., MARY JANE DAVIS, individually and as Middle Paxton Township Codes Enforcement Officer and LIGHT-HEIGEL & ASSOCIATES, INC.

Defendants

MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS JEFFREY A. ERNICO AND METTE, EVANS & WOODSIDE, P.C.

Defendants, Jeffrey A. Ernico and Mette, Evans & Woodside, P.C. (collectively referred to as "Ernico"), by their attorneys, Jeffrey P. Lewis, Esquire and Kathryn L. Simpson, Esquire, hereby move this Honorable Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment on their behalf and against plaintiffs, Richard C. Angino, Alice K. Angino, and King Drive Corporation (collectively referred to as "Angino'), and offer the following in support:

1. Angino purports to assert claims under 42 U.S.C. §1983 for violations of due process and equal protection as well as claims under the Pennsylvania Constitution for, *inter alia*, the alleged deprivation by Ernico and other defendants relating to the development by Angino of certain real estate located within the boundaries of defendant, Middle Paxton Township ("the township"). *Second Amended Complaint ("2nd Am. Comp.").*

2. At all times relevant to Angino's claims, Ernico served as the solicitor to the township's board of supervisors. *2nd Am. Comp.*, *¶12.*

3. Although Angino had previously alleged the existence of a civil conspiracy of each of the defendants herein to deprive him of his constitutional rights as a landowner within the township, he has since abandoned that claim. *2nd Am. Comp. cf. Complaint and First Amended Complaint.*

4. Although Angino makes numerous factual averments, all purportedly constituting liability producing conduct by Ernico, some of the bases for summary judgment stated below apply to all of Angino's claims and some apply to some of Angino's claims.

I. THE APPLICABLE STATUTE OF LIMITATIONS AND A RELEASE GIVEN BY ANGINO BOTH BAR CLAIMS FOR DAMAGES FROM ANY CONDUCT OCCURRING BEFORE 1998

5. Ernico incorporates by reference paragraphs 1 through 4 above in their entirety herein.

6. Angino commenced the above-captioned matter in January 2000.

7. The applicable statute of limitations for all claims is two years. *See, Kost v. Kozakiewicz,* 1 F.3d 176, 189-90 (3rd Cir. 1983).

8. Angino had commenced a previous action in this court against many of the same defendants, including Ernico, at 1-CV-97-1265 ("previous action"), wherein he alleges many of the same constitutional violations as he alleges here. *2nd Am. Comp.*, *¶20.*

9. That action led to a settlement agreement, which included, *inter alia,* the discontinuance of that action **with prejudice,** and a release, effective March 16, 1998. *2nd Am. Comp.*, *¶21.*

10. Both the applicable statute of limitations and the release given in the previous action bar Angino's claims for damages arising out of any alleged liability producing conduct occurring before either March (based upon the release) or January (based upon the statute of limitations) of 1998.

11. Because Angino alleges no liability producing conduct that occurred between January and March 1998, Ernico seeks summary

judgment for all claims arising out of his conduct occurring before March 1998, based upon application of both the statute of limitations and the release.

II. LACK OF STANDING BARS ANGINO'S CLAIM AGAINST ERNICO FOR "WRONGFUL" ADVICE GIVEN AS SOLICITOR TO HIS CLIENTS, THE SUPERVISORS

12. Ernico incorporates by reference herein paragraphs 1 through 11 above as if set forth at length.

13. As the township solicitor, Ernico engaged in an attorney/client relationship with the defendant township supervisors.

14. With respect to any advice given by Ernico to his clients, the supervisors, or with respect to any alleged failure by Ernico to advise his clients, Angino cannot assert a cause of action against Ernico, even if the supervisors engaged in actionable conduct based upon that advice, because Angino lacks standing because Ernico had not entered into any attorney/client relationship with Angino.

15. In view of the forgoing, Ernico is entitled to summary judgment for all claims relating to any legal advice by him that, *inter alia,* allegedly prompted the enactment of any allegedly unconstitutional ordinance.

III. ANGINO FAILS TO STATE A CAUSE OF ACTION UNDER §1983 FOR IT LACKS RIPENESS

16. Ernico incorporates by reference herein paragraphs 1 through 15 above as if set forth at length.

17. Even if Angino could state a claim against Ernico, notwithstanding the foregoing, as matter of law, he still cannot state a cause of action under 42 U.S.C. §1983 unless he has first challenged the constitutionality of the ordinances in question here under available provisions under state and local law (in this case, under the Municipalities Planning Code, Act of July 31, 1968, as amended, 53 P.S. §§10101 *et seq.* and the applicable Middle Paxton Township ordinances).

18. Specifically, Angino never filed and pursued and remedies such as an application for a curative amendment before the supervisors or a variance from the township's zoning hearing board, with

respect to any of the land development standards of which he now complains.

19. Because Angino failed to pursue these remedies, the township, through either its supervisors or zoning hearing board, was not afforded the opportunity to consider the constitutionality of these ordinances as they apply to Angino's realty, in the manner contemplated both under state and federal law.

20. In view of the foregoing, Angino's claims are not ripe under federal law and, accordingly, Ernico is entitled to summary judgment based upon Angino's failure, Angino failure to assert a claim under federal law as a matter of law.

IV. AS A MATTER OF LAW, ANGINO STATES NO CLAIM UNDER THE PENNSYLVANIA STATE CONSTITUTION

21. Ernico incorporates by reference herein paragraphs 1 through 20 above as if set forth at length.

22. The Pennsylvania legislature has never enacted enabling legislation, analogous to 42 U.S.C. §1983; without such, Angino cannot state a private cause of action under the state constitution.

23. Even if enabling legislation were not required to create such a private cause of action, Angino fails to state such a claim for the same reasons as set forth in I.-III. above.

24. In view of the foregoing, Ernico is entitled to summary judgment for Angino's claims under the state constitution.

V. A JUDGE'S FINDING OF "BAD FAITH" CONDUCT BY THE SUPERVISORS, IN A RELATED COMMON PLEAS ACTION, IN BREACHING THEIR CONTRACT WITH ANGINO, DOES NOT RISE TO THE LEVEL OF A CONSTITUTIONAL TORT, ESPECIALLY AGAINST THE SOLICITOR

25. Ernico incorporates by reference herein paragraphs 1 through 24 above as if set forth at length.

26. In the context of cross petitions to enforce the settlement agreement, a Common Pleas judge, at the same time that she found Angino in contempt of court, also found that the **timing** of the supervisors' requirement that Angino provide an engineer's safety certification relating to a dam constructed by Angino constituted "bad faith." *2nd Am. Comp.*, ¶23 & 71.

27. Such finding does not constitute a cause of action against Ernico as the solicitor, for the following reasons:

a. A finding of "bad faith" in the context of a breach of contract claim does not rise to the level of a constitutional tort; and

b. Even if it did, it does not constitute collateral estoppel because the solicitor does not stand "in the shoes of" the supervisors.

28. In view of the foregoing, Ernico is entitled to summary judgment with respect to the contention that this finding of "bad faith" provides the basis for a claim against Ernico.

VI. PRAYER FOR RELIEF

29. The moving parties incorporate by reference herein their Rule 56(A) brief in support of this motion, a separate set of bound exhibits pursuant to Local Rule 5.1(f) and Statement By Defendants Ernico And Mette, Evans & Woodside, P.C. Of Material Facts As To Which There Is No Genuine Issue In Dispute.

WHEREFORE, pursuant to F.R.Civ.P. 56, defendants, Jeffrey A. Ernico, Esquire and Mette, Evans & Woodside, P.C., pray that this Honorable Court enter summary judgment in their favor and against plaintiffs, Richard C. Angino, Alice K. Angino, and King Drive Corporation in no amount.

McKISSOCK & HOFFMAN, P.C.
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METTE, EVANS & WOODSIDE
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Kathryn L. Simpson, Esquire
Attorney Identification No. 28960
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Co-Counsel for Defendants, Jeffrey A. Ernico and Mette, Evans & Woodside

Date: 11/21/01

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT COURT OF
PENNSYLVANIA

FILED
SCRANTON
FEB 28 2000
Per /s/illegible
Deputy Clerk

CIVIL ACTION—LAW

NO. 1:CV-00-0086

(JUDGE CAPUTO)

JURY TRIAL DEMANDED

RICHARD C. ANGINO, ALICE K. ANGINO, and KING DRIVE CORP.,

Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Defendants

MOTION TO EXTEND DEADLINES AND CONTINUE TRIAL

The various Defendants have in their Motions for Summary Judgment raised the issue of "ripeness". Although Plaintiffs contend that "ripeness" is not an issue in the instant case because the Supervisors are the highest governing body, the legislative body which passed the 2000 Zoning Ordinance and refused to amend the ordinance to remove unconstitutional articles and sections despite Dauphin County's refusal to approve the ordinance (**Exhibit A**), Plaintiffs' request for curative amendments (**Exhibit B**), the Township's response, two years of litigation, numerous expert re-

ports, and the deposition testimony of the zoning planner and the zoning land use legal advisor. If for some reason Your Honorable Court still considers "ripeness" to be an issue, Plaintiffs request Your Honorable Court to extend the pre-trial and trial dates by three months and order the Township Defendants to make a decision as to Plaintiffs' formal motion for curative amendments as per Motion for Curative Amendment filed today. *See*, Affidavit accompanying this Motion.

Respectfully submitted,
ANGINO & ROVNER, P.C.
/s/Richard C. Angino
Richard C Angino, Esquire
I.D. No. 07140
4503 N. Front Street
Harrisburg, PA 17110
(717) 238-6791
Attorney for Plaintiffs

Date: 2/27/02

EXH A

DAUPHIN COUNTY PLANNING COMMISSION
DAUPHIN COUNTY COURT HOUSE – HARRISBURG, PENNSYLVANIA 17101
STAFF OFFICE
112 Market Street, 8th Floor
Harrisburg, Pennsylvania 17101-2015
Telephone 717-234-2639
Fax 717-234-4058
e-mail: planning@tcrpc-pa.org

August 8, 2000

Middle Paxton Township Board of Supervisors
Attn: Mr. J. Thomas Van Wagner
Secretary/Supervisor
P.O. Box 277
Dauphin, PA 17018

RE: Middle Paxton Township Zoning Ordinance review

Dear Supervisors:

On August 7, 2000, the Dauphin County Planning Commission reviewed the proposed Zoning Ordinance for Middle Paxton Township.

Upon review, the Commission recommends the ordinance not be approved unless the enclosed concerns are addressed.

Should you have any questions, please contact Ms. Jessica Petrewicz, Transportation Planner, at (717) 234-2639.

Sincerely yours,
/s/Donald Horner Sr.
Donald Horner
Chairman
Enclosure

Middle Paxton Township, Dauphin County, Pennsylvania
Zoning Ordinance

The Dauphin County Staff review of this ordinance offers the following general comments:

1. Several areas on the zoning map do not comply with the comprehensive plan's land use designations (see enclosed map). Commercial and residential designations conflict. The "park and recreation" land use plan designation has no zoning designation. We suggest the new zoning code include a "parks and recreation", "conservation" or similar district to meet the needs of this designation.

2. We suggest the township solicitor carefully review the proposed zoning code for compliance with the Pennsylvania Municipalities Planning Code (PMPC). Several provisions of the PMPC are not included in the zoning code (e.g. planning commission public hearings, procedures for curative amendments, interpretation of ordinance provisions). There are also provisions that conflict with the PMPC (e.g. who receives enforcement notices, variance hardship tests, disqualified zoning board members, replacement by an alternate).

3. The township solicitor should be actively involved in the rewrite and adoption of a new zoning code. He needs to be familiar with the basis for the changes and the intent of new provisions.

The following specific comments should also be considered:

1. The term "Agribusiness" is used to describe the sale of farm products/equipment in the "Definition" section of the Ordinance. Should Agribusiness be included in the Agricultural and Rural Residential (A-RR) district? (Article 3, Table 3-1)

2. Article 12, Section 1201.A.1.a defines the terms "Floodway" and "Floodway Fringe." Both these terms are already referenced in the "Definition" section of the Ordinance, but the "Floodway" definitions should be the same.

3. Article 12, Section 1201.A.1.a references the term "Approximated Flood Plain." It should be located or referenced in the "Definition" section of the Ordinance.

4. Article 12, Section 1202.A.1.a.3 reads as, "Accessory residential uses such as yard areas, gardens, play areas, and *impervious* parking areas." The existing Zoning Ordinance also mentions this section, but refers to *pervious* parking areas. The type of parking area allowed should be clarified as one or the other.

5. Article 12, Section 1202.A.1.b.3 reads as, "Water related uses and activities such as marinas, docks, wharves, piers, etc.." The term "etc." should be removed because it can imply a number of other (possibly unwanted) uses.

6. Article 13, Section 1300.G states the following standards will only apply to "non-residential" users abutting "residential" users. Should there be standards for a "residential" user abutting another "residential" user scenario?

7. Article 13, Section 1300.G.1 references the term "dusk to dawn." This term should be defined or given a time value in the "Definition" section of the Ordinance.

8. Article 13, Section 1300.G.15 uses the term "dawn". This term should be defined or given a time value in the "Definition" section of the Ordinance

9. Article 13, Section 1303.E uses the term "and the like." This term may allow for confusion of uses and should be removed.

10. Article 13, Section 1304.C uses the terms "unsightly" and "distracting." These terms may cause confusion and should be defined or removed.

11. Article 14, Section 1404.A uses the terms "suitable", "harmonious", and "proper." These terms may causes confusion and should be defined or removed.

12. Provisions of the ordinance that require a visual screen/buffer, such as Section 1430.C, should reference Table 13, Screening Requirements as the applicable standards to

follow. This establishes a uniform set of criteria for all such applications.

13. It is recommended the Township explore application of the cluster option to the remainder of the residential and non-residential districts.

14. It is recommended the Township investigate application of the "Estate" zoning concept. The South Hanover Township Zoning Ordinance is suggested as a source for review and consideration.

15. Upon reviewing the proposed zoning map, it does not appear to provide sufficient diversified medium and high density residential development opportunities, given the overall size of the Township.

The Dauphin County Planning Commission thanks you for the opportunity to review your Zoning Ordinance. Prior to voting on the enactment of the Zoning Ordinance, Middle Paxton Township must hold a public hearing thereon, pursuant to public notice and provide the Dauphin County Planning Commission with a copy of the Zoning Ordinance within 30 days after enactment (PA Municipalities Planning Code, Section 608).

Please feel free to contact Ms. Jessica Petrewicz at (717) 234-2639 with any comment or concerns regarding these recommendations.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT COURT OF
PENNSYLVANIA

CIVIL ACTION—LAW

NO. 1:CV-00-0086

(JUDGE CAPUTO)

JURY TRIAL DEMANDED

FILED
SCRANTON
FEB 28 2002
Per /s/illegible
Deputy Clerk

RICHARD C. ANGINO, ALICE K. ANGINO, and KING DRIVE CORP.,

Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Defendants

COMMONWEALTH OF PENNSYLVANIA :
: S.S.
COUNTY OF DAUPHIN :

AFFIDAVIT OF RICHARD C. ANGINO

I, Richard C. Angino, depose and say that I have prepared and filed the Challenge to the Validity of the 2000 Zoning Ordinance Coupled with a Curative Amendment attached hereto.

/s/Richard C. Angino
Richard C. Angino, Esquire

Sworn to and subscribed
before me this 27th day of
February, 2002
/s/Megan A. Reinard
Notary Public
My Commission Expires:
NOTORIAL SEAL
MEGAN A. REINARD, NOTARY PUBLIC
SELINSGROVE BORO., SNYDER COUNTY
MY COMMISSION EXPIRES MAY 7, 2005

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

NO. 1:-CV-00-0086

JUDGE CAPUTO

RICHARD C. ANGINO, ALICE K. ANGINO and KING DRIVE CORP.

Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C., MARY JANE DAVIS, individually and as Middle Paxton Township Codes Enforcement Officer and LIGHT-HEIGEL & ASSOCIATES, INC.

Defendants

REPLY BY DEFENDANTS, JEFFREY A. ERNICO AND METTE, EVANS & WOODSIDE, P.C., TO PLAINTIFFS' MOTION TO AMEND SECOND AMENDED COMPLAINT (DOC. 116)

If Your Honorable Court denies Angino's Motion To Extend Deadlines And Continue Trial (Doc. 115) and dismisses this action, that would render moot the Motion To Amend The Second Amended Complaint (Doc. 116).

Moreover, pursuant to Rule 15(a), this court's granting leave to amend "shall be freely given when justice so requires." Here justice does **not** so require.

All defendants filed and briefed summary judgment motions in reliance upon the absence of a conspiracy theory, not just because Angino conceded his conspiracy claims in his deposition but because he had move to amend his complaint to drop the conspiracy count. *See, Second Amended Complaint (Doc. 51).*[1] Plain-

[1] Defendant Light-Heigel, in its response to this motion, quotes extensively from Angino's deposition his concession of no conspiracy.

tiffs responded to those motions in a manner totally consistent with the absence of a conspiracy **and took the same position before this court at oral argument on February 26, 2002, just three days before filing these two pending motions.** Now that the summary judgment motions have been briefed, argued and are ripe for disposition, Angino attempts to reverse course.

Moreover, this amendment would not effect the status of the summary judgment motions because plaintiffs "may not rest upon the mere allegations ... of [its] pleading [in opposing entry of summary motion]." *Rule 56(e).* In short, the issue of whether the summary judgment "record" demonstrates a genuine issue of fact relating to conspiracy has never been briefed, nor was it even raised. Angino does not specifically identify what new he learned from the December 2001 document request. Even giving him every benefit of the doubt, evidence allegedly "discovered" by him in December 2001, does not excuse his conceding conspiracy when he stood before this court more than two months later and then just three days thereafter asking to amend his complaint to raise conspiracy.

Finally, the proposed amendment, as it relates to Ernico, does not state a cause of action anyhow, as a matter of law. In *Heffernan v. Hunter,* 189 F.3d 405 (3d Cir. 1999) ["*Hefferman*"], this circuit, applying the "intracorporate conspiracy doctrine" by analogy, holds that a lawyer can not be liable under 27 U.S.C.A. §1985 (1) or (2), both of which require a conspiracy, for his advice or advocacy if done for his client's benefit rather than for his "sole personal benefit". *Id.* at 411-413.

For the foregoing reasons, defendants, Jeffrey A. Ernico and Mette, Evans & Woodside, P.C. pray that Your Honorable Court deny plaintiff's motion to amend the second amended complaint (Doc. 116).

Respectfully submitted,
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Co-Counsel for Defendants, Jeffrey A. Ernico and Mette, Evans & Woodside, P.C.

Date: 3/14/02

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION—LAW

NO. 1:CV-00-0086

JUDGE CAPUTO

JURY TRIAL DEMANDED

RICHARD C. ANGINO, ALICE K. ANGINO and KING DRIVE CORP.,

Plaintiffs

v.

J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO, METTE, EVANS &WOODSIDE, P.C., MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer, and LIGHT-HEIGEL & ASSOCIATES, INC.,

Defendants

ANSWER OF DEFENDANTS VAN WAGNER, SMITH, PEFFER, DAVIS AND MIDDLE PAXTON TOWNSHIP TO PLAINTIFFS' MOTION TO EXTEND DEADLINES AND CONTINUE TRIAL

1. Each of the Defendants in this matter have filed motions for summary judgment, raising, *inter alia,* the issue of the "ripeness" of Plaintiffs' land-development based civil rights claims.

2. Oral argument was presented to this Honorable Court on February 25 on the various motions for summary judgment, at which time the Defendants argued that case law requires an aggrieved land owner to obtain a final decision from the highest municipal decision-maker on land use matters before a claim of constitutional

deprivation is deemed ripe, i.e. before there is a case or controversy that a federal district court may consider.

3. Specifically, the Defendants argued that the Plaintiffs must challenge an allegedly unconstitutional land use ordinance by either filing a substantive challenge to the ordinance with the zoning hearing board or by filing for a curative amendment with the board of supervisors pursuant to §10609.1 of the Municipalities Planning Code.

4. The Plaintiffs argued, in opposition, that the matter was ripe and that no request for a curative amendment was necessary for the District Court to decide the issues presented by the Second Amended Complaint.

5. However, despite Plaintiffs' protestations to the contrary, Plaintiffs filed a challenge to the Middle Paxton Township 2000 Zoning Ordinance by requesting a curative amendment, said challenge being filed with the Middle Paxton Township Board of Supervisors on February 27, 2002. A copy of the challenge filed by the Plaintiffs is attached to Plaintiffs' Motion to Extend Deadlines and Continue Trial.

6. The Township Defendants, i.e. Van Wagner, Smith, Peffer, Davis and Middle Paxton Township, submit to this Honorable Court that Plaintiffs' filing of the challenge to the zoning ordinance and request for curative amendment within 2 days of oral argument constitutes an admission, concession and/or acknowledgement of the validity of the Defendant's argument that Plaintiffs' civil rights suit is not ripe and must, therefore, be dismissed as the matter is not justiciable.

7. Although the Defendants have entitled their various motions as being for summary judgment, they are more appropriately in the nature of motions to dismiss as they address the jurisdiction of the court to address the issues raised in the Second Amended Complaint and the concept of justiciability or ripeness.

8. Inasmuch as the matters raised in this action are not ripe for consideration by this Honorable Court, as unequivocally acknowledged by the Plaintiffs by their act of filing a challenge to the zoning ordinance and seeking a curative amendment pursuant to

the Municipalities Planning Code, Plaintiffs' suit should be dismissed, in which case there is no need to consider the extension of deadlines and the continuance of the trial.

WHEREFORE, Defendants J. Thomas Van Wagner, Jeffery Smith, Richard Peffer, Mary Jane Davis and Middle Paxton Township respectfully request that this Honorable Court dismiss the Plaintiffs' suit due to lack of ripeness and, consequently, deny Plaintiffs' Motion to Extend Deadlines and Continue Trial as being moot since there is no justiciable case or controversy.

THOMAS, THOMAS &
HAFER, LLP
/s/C. Kent Price
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ATTORNEYS FOR DEFENDANTS
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JEFFERY SMITH, RICHARD
PEFFER, MARY JANE DAVIS and
MIDDLE PAXTON TOWNSHIP

Notice of Special Meeting and Public Hearing of the Board of Supervisors of Middle Paxton Township upon a Challenge to the Validity of the Township of Middle Paxton Zoning Ordinance

Notice is hereby given that Richard C. Angino, Alice K. Angino, and King Drive Corp. (the "Landowners") have filed a challenge to the validity of and have proposed amendments to the Township of Middle Paxton Zoning Ordinance ("Zoning Ordinance") which they have titled "Challenge to the Validity of the 2000 Zoning Ordinance Coupled with a Curative Amendment". The challenge contends that various provisions of the Zoning Ordinance are unconstitutional, illegal, contrary to established precedent, contrary to the Township's 1987 and 1998 Comprehensive Plans, exclusionary, unduly restrictive, do not provide for a fair share of housing needs, and/or are violative of the Landowners' rights to use, develop, and/or sell some or all of their land. As a result of this challenge and as required by the Pennsylvania Municipalities Planning Code ("MPC"), notice is further given that the validity of the Zoning Ordinance and Zoning Map are in question. More specifically, the Landowners allege that their land is not suitable for agricultural use, that minimum lot size requirements of two or three acres contained in the Zoning Ordinance are exclusionary, that the steep slope requirements of the Zoning Ordinance are exclusionary, and that the Zoning Ordinance is "exclusionary" and/or "unduly restrictive" with respect to their land and the entire Fishing Creek Valley.

The Landowners' property contains 704 acres, more or less, and is generally located on the north and south sides of Fishing Creek Valley Road (SR 0443) in Fishing Creek Valley. The challenge to the validity of the Zoning Ordinance and Zoning Map seeks to change the zoning classification of the Landowners' property and Fishing Creek Valley to a new zoning district to be designated as Suburban Residential District (S-R District) or, in the alternative, to change the zoning classification of Landowners' property to a new zoning district to be designated as Resort Conservation District (R-C District). The Landowners also seek to change the

steep slope regulations contained in the Zoning Ordinance. The challenge, including the proposed Suburban Residential District (S-R District) regulations, the proposed Resort Conservation District (R-C District) regulations, the proposed steep slope regulations, and the other accompanying exhibits and materials, may be examined by the public without charge or obtained for a charge not greater than the cost thereof at the Middle Paxton Township Municipal Building, 1304 Overlook Street, Dauphin, Pennsylvania, Mondays through Fridays from 8:30 a.m. to 4:30 p.m.

The Board of Supervisors of Middle Paxton Township, Dauphin County, Pennsylvania, shall hold a special public meeting and public hearing upon and to consider this challenge to the validity of and the proposed amendments to the Zoning Ordinance and the Zoning Map on Thursday, June 20, 2002, at 6:30 p.m., prevailing time, at the Middle Paxton Elementary School, 931 Peters Mountain Road, Dauphin, Pennsylvania. Beginning at 6:30 p.m. on June 20 the Board of Supervisors will address procedural issues and requirements relating to the scheduling and conduct of the public meeting and hearing. Thereafter, at approximately 7:30 p.m. on June 20, the presentation of the Landowners' case in chief will commence.

The public is invited to attend this meeting and hearing. In addition to the procedures for curative amendments under Section 609.1 of the MPC, the hearing shall also be conducted in accordance with Sections 908 and 916.1 and other applicable requirements of the MPC.

42 USCS §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§10916.1. Validity of ordinance; substantive questions

(a) A landowner who, on substantive grounds, desires to challenge the validity of an ordinance or map or any provision thereof which prohibits or restricts the use or development of land in which he has an interest shall submit the challenge either:

(1) to the zoning hearing board under section 909.1(a);[1]

or

(2) to the governing body under section 909.1(b)(4), together with a request for a curative amendment under section 609.1.[2]

(b) Persons aggrieved by a use or development permitted on the land of another by an ordinance or map, or any provision thereof, who desires to challenge its validity on substantive grounds shall first submit their challenge to the zoning hearing board for a decision thereon under section 909.1(a)(1).

(c) The submissions referred to in subsections (a) and (b) shall be governed by the following:

(1) In challenges before the zoning hearing board, the challenging party shall make a written request to the board that it hold a hearing on its challenge. The request shall contain the reasons for the challenge. Where the landowner desires to challenge the validity of such ordinance and elects to proceed by curative amendment under section 609.1, his application to the governing body shall contain, in addition to the requirements of the written request hereof, the plans and explanatory materials describing the use or development proposed by the landowner in lieu of the use or development permitted by the challenged ordinance or map. Such plans or other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a permit, so long as they provide reasonable notice of the proposed use or development and a sufficient basis for evaluating the challenged ordinance or map in light thereof. Nothing herein contained shall preclude the landowner from first seeking a final approval before submitting his challenge.

(2) If the submission is made by the landowner to the governing body under subsection (a)(2), the request also shall be accompanied by an amendment or amendments to the ordinance proposed by the landowner to cure the alleged defects therein.

(3) If the submission is made to the governing body, the municipal solicitor shall represent and advise it at the hearing or hearings referred to in section 909.1(b)(4).

(4) The governing body may retain an independent attorney to present the defense of the challenged ordinance or map on its behalf and to present their witnesses on its behalf.

(5) Based upon the testimony presented at the hearing or hearings, the governing body or the zoning board, as the case may be, shall determine whether the challenged ordinance or map is defective, as alleged by the landowner. If a challenge heard by a governing body is found to have merit, the governing body shall proceed as provided in section 609.1. If a challenge heard by a zoning hearing board is found to have merit, the decision of the zoning hearing board shall include recommended amendments to the challenged ordinance which will cure the defects found. In reaching its decision, the zoning hearing board shall consider the amendments, plans and explanatory material submitted by the landowner and shall also consider:

(i) the impact of the proposal upon roads, sewer facilities, water supplies, schools and other public service facilities;

(ii) if the proposal is for a residential use, the impact of the proposal upon regional housing needs and the effectiveness of the proposal in providing housing units of a type actually available to and affordable by classes of persons otherwise unlawfully excluded by the challenged provisions of the ordinance or map;

(iii) the suitability of the site for the intensity of use proposed by the site's soils, slopes, woodlands, wetlands, flood plains, aquifers, natural resources and other natural features;

(iv) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plains, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and

(v) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.

(6) The governing body or the zoning hearing board, as the case may be, shall render its decision within 45 days after the conclusion of the last hearing.

(7) If the governing body or the zoning board, as the case may be, fails to act on the landowner's request within the time limits referred to in paragraph (6), a denial of the request is deemed to have occurred on the 46th day after the close of the last hearing.

(d) The zoning hearing board or governing body, as the case may be, shall commence its hearings within 60 days after the request is filed unless the landowner requests or consents to an extension of time.

(e) Public notice of the hearing shall include notice that the validity of the ordinance or map is in question and shall give the place where and the times when a copy of the request, including any plans, explanatory material or proposed amendments may be examined by the public.

(f) The challenge shall be deemed denied when:

(1) the zoning hearing board or governing body, as the case may be, fails to commence the hearing within the time limits set forth in subsection (d);

(2) the governing body notifies the landowner that it will not adopt the curative amendment;

(3) the governing body adopts another curative amendment which is unacceptable to the landowner; or

(4) the zoning hearing board or governing body, as the case may be, fails to act on the request 45 days after the close

of the last hearing on the request, unless the time is extended by mutual consent by the landowner and municipality.

(g) Where, after the effective date of this act, a curative amendment proposal is approved by the grant of a curative amendment application by the governing body pursuant to section 909.1(b)(4) or a validity challenge is sustained by the zoning hearing board pursuant to section 909.1(a)(1) or the court acts finally on appeal from denial of a curative amendment proposal or a validity challenge, and the proposal or challenge so approved requires a further application for subdivision or land development, the developer shall have two years from the date of such approval to file an application for preliminary or tentative approval pursuant to Article V or VII.[3] Within the two-year period, no subsequent change or amendment in the zoning, subdivision or other governing ordinance or plan shall be applied in any manner which adversely affects the rights of the applicant as granted in the curative amendment or the sustained validity challenge. Upon the filing of the preliminary or tentative plan, the provisions of section 508(4)[4] shall apply. Where the proposal appended to the curative amendment application or the validity challenge is approved but does not require further application under any subdivision or land development ordinance, the developer shall have one year within which to file for a building permit. Within the one-year period, no subsequent change or amendment in the zoning, subdivision or other governing ordinance or plan shall be applied in any manner which adversely affects the rights of the applicant as granted in the curative amendment or the sustained validity challenge. During these protected periods, the court shall retain or assume jurisdiction for the purpose of awarding such supplemental relief as may be necessary.

(h) Where municipalities have adopted a multimunicipal comprehensive plan pursuant to Article XI[5] but have not adopted a joint municipal ordinance pursuant to Article VIII-A[6] and all municipalities participating in the multimunicipal comprehensive plan have adopted and are administering zoning ordinances generally consistent with the provisions of the multimunicipal comprehen-

sive plan and a challenge is brought to the validity of a zoning ordinance of a participating municipality involving a proposed use, then the zoning hearing board or governing body, as the case may be, shall consider the availability of uses under zoning ordinances within the municipalities participating in the multimunicipal comprehensive plan within a reasonable geographic area and shall not limit its consideration to the application of the zoning ordinance on the municipality whose zoning ordinance is being challenged.

(i) A landowner who has challenged on substantive grounds the validity of a zoning ordinance or map either by submission of a curative amendment to the governing body under subsection (a)(2) or to the zoning hearing board under section 909.1(a)(1) shall not submit any additional substantive challenges involving the same parcel, group of parcels or part thereof until such time as the status of the landowner's original challenge has been finally determined or withdrawn: Provided, however, That if after the date of the landowner's original challenge the municipality adopts a substantially new or different zoning ordinance or zoning map, the landowner may file a second substantive challenge to the new or different zoning ordinance or zoning map under subsection (a).

Amended 2000, June 22, P.L. 483, No. 67, §2, effective in 60 days; 2000, Dec. 20, P.L. 940, No. 127, §2, effective in 60 days.

[footnotes omitted]

MUNICIPAL & QUASI-MUN. CORPS. 53 P.S. §10604

§10604. Zoning purposes

The provisions of zoning ordinances shall be designed:

(1) To promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations, airports, and national defense facilities, the provisions of adequate light and air, access to incident solar energy, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, recreational facilities, public grounds, the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use, and other public requirements; as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and flood plains.

(2) To prevent one or more of the following: overcrowding of land, blight, danger and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers.

(3) To preserve prime agriculture and farmland considering topography, soil type and classification, and present use.

(4) To provide for the use of land within the municipality for residential housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes and mobile home parks, provided, however, that no zoning ordinance shall be deemed invalid for the failure to provide for any other specific dwelling type.

(5) To accommodate reasonable overall community growth, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses.

1968, July 31, P.L. 805, No. 247, art. VI, §604. Amended 1978, Nov. 26, P.L. 1209, No. 284, §1, imd. effective. Reenacted and amended 1988, Dec. 21, P.L. 1329, No. 170, §49, effective in 60 days.

FILED
SCRANTON
AUG 17 2000
Per /s/illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 3:CV-00-0086

(JUDGE CAPUTO)

RICHARD C. ANGINO, ALICE K. ANGINO AND KING DRIVE CORP.,

Plaintiffs,

vs.

J. THOMAS VAN WAGNER, SMITH, RICHARD PEFFER, Individually and as Supervisors of MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, PC, MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer and LIGHT-HEIGEL & ASSOCIATES, INC.,

Defendants.

MEMORANDUM

On or about January 17, 2000, plaintiffs filed the present complaint under 42 U.S.C. §1983. (Amended Complaint, doc. 16.) The complaint contains two counts: I) violations of plaintiffs' Fifth and Fourteenth Amendment rights, and; II) civil conspiracy. (Amended Complaint, doc. 16.) On April 26, 2000, defendants filed a motion to dismiss plaintiffs' amended complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and for a more definite statement under Fed. R. Civ. P. 12(e). (Motion to Dismiss Amended Complaint, doc. 17.) Defendants set forth the following arguments in

support of their motion: 1) plaintiffs have failed to state claims under the Fifth and Fourteenth Amendments where there are adequate remedies under state law; 2) plaintiffs have failed to state the basis of a Section 1983 claim against defendant Ernico; 3) plaintiffs' conspiracy claim lacks the requisite specificity, and the claim upon which it is based is not justiciable; 4) defendant employees of Middle Paxton Township are not liable for punitive damages; 5) all defendants are entitled to qualified immunity. (*Id.* at 2.) In the alternative, defendants argue that plaintiffs should be required to file a more definite statement. (*Id.* at 3.) Because I find that plaintiffs have stated a claim for relief under Section 1983 against all defendants; plaintiffs have set forth a claim for civil conspiracy; the individual defendants are not immune from for punitive damages, and; defendants have failed to demonstrate entitlement to qualified immunity, defendants' motion to dismiss will be denied. Additionally, because I find that plaintiffs have complied with the pleading requirements under Fed. R. Civ. P. 8(a), defendants' motion for a more definite statement will be denied.

BACKGROUND

The allegations in plaintiffs' complaint are as follows. Plaintiffs Richard C. Angino and Alice K. Angino ("the Anginos") are the owners of approximately seven-hundred (700) acres of land on Fishing Creek Valley Road in Middle Paxton Township, Pennsylvania. (Amended Complaint, doc. 15 at ¶15.) Over the past thirty (30) years, the Anginos have acquired, developed and marketed a resort, golf course, and spa and fitness center on the land. (*Id.* at ¶16.)

In 1997, the Anginos filed a suit against Middle Paxton Township ("the Township") in the Middle District of Pennsylvania, 1:CV-97-1265, alleging various constitutional violations. (*Id.* at ¶17.) On March 16, 1998, the parties entered into a settlement agreement ("the Agreement"). (*Id.* at ¶18.)

In violation of the Agreement, defendants have refused to approve development of a ten-lot subdivision located on approximately ninety (90) acres of the Anginos' land. (*Id.* at ¶20.) As a result, the Anginos have been forced to limit overnight lodging

accommodations on the land and cannot expand existing dining and banquet facilities or create meeting spaces. (*Id.* at ¶22.)

Defendants' illegal conduct has included: 1) requiring the Anginos to obtain occupancy permits, even after the time for denying such permits had expired; 2) requiring the inclusion of an "impermeable core" in a dam that had already been constructed on the property; 3) denying the Anginos' development plans through imposition of various "bad faith" restrictions; 4) requiring bonding and adhesion requirements; 5) treating the Anginos' commercial property differently than similarly situated not-for-profit recreational facilities; 6) requiring ten-percent slopes for roads in mountainous territory, rather than the fifteen-percent slope required under state and federal law; 7) frivolously initiating litigation with respect to the occupancy of the lodges. (*Id.* at ¶23, 34, 35.)

The Anginos have sustained substantial damages as a result of defendants' continued attempts to limit, stop, and make prohibitively expensive the development of the disputed property. (*Id.* at ¶37.) As a result, the Anginos have filed the present complaint, alleging constitutional violations under the Fifth and Fourteenth Amendments and civil conspiracy against defendants. (*Id.* at ¶¶40 et al.)

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) states that a motion to dismiss may be granted for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). For the purposes of the motion to dismiss, the court takes as true all well-pleaded allegations in plaintiff's complaint and construes all reasonable inferences in the pleader's favor. *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3rd Cir. 1998). The burden is on the moving party to prove that no claim exists. *See In re Corestates Trust Fee Litigation*, 837 F.Supp. 104 (E.D. Pa. 1993), *aff'd*, 39 F.3d. 61 (3rd Cir. 1994). A complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory on which he intends to proceed. *Bowers v. Hardwick*, 106 S.Ct. 2841, 2849, 478 U.S. 186, 202, 92 L.Ed.2d 140 (1986). The court has a duty to examine the complaint to determine if the allegations pro-

vide for relief on any possible theory. *Id.* A complaint should only be dismissed for failure to state a claim if it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

DISCUSSION

I. Defendants' Motion to Dismiss

A. Motion to Dismiss Plaintiffs' Section 1983 Claim

Defendants first move to dismiss plaintiffs' Section 1983 claim (Count I). (Brief in Support of Joint Motion to Dismiss, doc. 18 at 4-5.) Defendants contend that plaintiffs cannot assert a direct claim for relief under the Fifth or Fourteenth Amendments. In addition, defendants argue that plaintiffs cannot set forth Fifth and Fourteenth Amendment claims under Section 1983 as there are adequate remedies under state law. (*Id.*) Plaintiffs counter that their constitutional claims meet the pleading requirements under Section 1983. (Plaintiffs' Brief in Opposition, doc. 19 at 5.)

42 U.S.C. §1983 "is not a source of substantive rights, but provides a remedy against state officials for violations of constitutional rights." *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998) (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985)). In order to set forth an actionable Section 1983 claim, a plaintiff must allege that: 1) the conduct complained of was committed by a person acting under color of state law, and; (2) the conduct deprived the plaintiff of rights secured under the Constitution or federal law. *Id.* (citing *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55, 101 L.Ed.2d 40 (1988)).

In the present case, defendants' first argument must fail as plaintiffs do not attempt to "assert a direct claim ... under the [Fifth] and [Fourteenth] Amendments ..." (Defendants' Brief in Support of Joint Motion to Dismiss, doc. 18 at 3.) Rather, plaintiffs set forth a claim under Section 1983 alleging that defendants acted in their official capacity to deprive plaintiffs of their Fifth and Fourteenth Amendment rights. (See Amended Complaint, doc. 16 at ¶¶40 et al.) Therefore, plaintiffs have met the pleading requirements under Section 1983. *See Sameric Corp.*, 142 F.3d at 590.

Defendants' second argument also must fail. Defendants rely upon *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), to argue that Pennsylvania provides an adequate procedure for challenging zoning ordinances and, therefore, plaintiffs do not possess a procedural due process claim. *Id.* at 1127. Plaintiffs, however, allege that defendants violated their *substantive* due process rights through "arbitrary and capricious" zoning actions (emphasis added). (See Amended Complaint, doc. 16 at §§40, 45.) Several cases, including *Bello*, affirm a party's right to set forth such a claim. *See Bello* at 1128 (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977) (constitutional right to be free from arbitrary or irrational zoning action); *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1034-35 (3d Cir. 1987), *cert. denied*, ___ U.S. ___, 107 S.Ct. 2482, 96 L.Ed.2d 375 (1987). Therefore, plaintiffs have alleged an actionable Section 1983 claim. Accordingly, defendants' motion to dismiss Count I of plaintiffs' complaint will be denied.

B. Motion to Dismiss Plaintiffs' Section 1983 Claim Against Ernico

Defendants also move to dismiss plaintiffs' Section 1983 claim against defendant Jeffrey Ernico ("Ernico"), the solicitor for the Township during the relevant time period. (Brief in Support of Joint Motion to Dismiss, doc. 18 at 5.) Defendants argue that Ernico is not a Township official and, therefore, did not act under color of state law. (*Id.* at 6.) Plaintiffs respond that a private party may be liable under Section 1983 if he or she participates with state officials in an unconstitutional act. (Plaintiffs' Brief in Opposition, doc. 19 at 7.)

Under Pennsylvania law, a municipal solicitor is not considered a public official. *Ballou v. State Ethics Commission*, 496 Pa. 127, 134, 436 A.2d 186, 189 (1981). A private party, however, may be liable under Section 1983 when the party participates with state officials in an activity which is constitutionally prohibited. *Smith v. Wambaugh*, 29 F.Supp.2d 222, 226 (M.D.Pa. 1998) (*Sullivan v. Barnett*, 139 F.3d 158, 167 (3d Cir. 1997), *cert. granted sub nom. American Manufacturers Mutual Insurance Co. v. Sullivan*, 524 U.S. 981, 119 S.Ct. 29, 141 L.Ed.2d 789 (1998)).

In the present case, plaintiffs allege that Ernico, as Township solicitor, participated with Township officials to deprive plaintiffs of their Fourth and Fifth Amendment rights. (Amended Complaint, doc. 18 at ¶44.) Therefore, plaintiffs' allegations, when accepted as true, would impose liability upon Ernico under Section 1983. *See Smith*, 29 F.Supp.2d. at 226. Accordingly, defendants' motion to dismiss Count I of plaintiffs' complaint against Ernico will be denied.

C. Motion to Dismiss Plaintiffs' Civil Conspiracy Claim

Defendants also move to dismiss plaintiffs' civil conspiracy claim (Count II). (Brief in Support of Joint Motion, doc. 18 at 7.) Defendants argue that "the claim is couched in nothing more than conclusory language and is wholly devoid of the requisite specificity to set forth a ... claim." (*Id.*) Plaintiffs counter that a cognizable claim of civil conspiracy is alleged under Count II. (Plaintiffs' Brief in Opposition to Joint Motion, doc. 19 at 6.)

In order to set forth an actionable claim of civil conspiracy under Section 1983, "a plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right 'under color of law.' " *Williams v. Fedor*, 69 F.Supp.2d 649, 655 (M.D.Pa. 1999) (citing *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 700 (3d Cir.1993)). A plaintiff, however, may not make "[b]are conclusory allegations of 'conspiracy' or 'concerted action,' " but must "expressly allege an agreement or make averments of communication, consultation, cooperation, or command from which such agreement can be inferred." *Burden v. Wilkes-Barre Area School District*, 16 F.Supp.2d 569, 573 (M.D.Pa. 1998) (quoting *Flanagan v. Shively*, 783 F.Supp. 922, 928 (M.D.Pa.), *aff'd*, 980 F.2d 722 (3d Cir.1992), *cert. denied*, 510 U.S. 829, 114 S.Ct. 95, 126 L.Ed.2d 62 (1993)).

Under the standard utilized in the *Burden*, and construed in the light most favorable to plaintiff, the present complaint alleges a claim for conspiracy against the defendants. *See Burden*, 16 F.Supp.2d at 573. Plaintiffs aver that defendants Township "did act and continued to act with a common purpose to deprive [p]laintiffs of their federally protected rights under the Constitution of the United States ..." (Amended Complaint, doc. 16 at ¶¶49, 50.) More-

over, plaintiffs set forth additional allegations "bearing out the existence of the conspiracy." *See Burden*, 16 F.Supp.2d at 573. Specifically, plaintiffs allege that defendants have conspired to deny permits and approval plans sought by plaintiffs, "participate[ ] in the creation of long-range plan[ning] and ... zoning laws that have separated [p]laintiffs from all other citizens of [the Township]," and institute frivolous litigation against plaintiffs. (Amended Complaint, doc. 16 at ¶¶26-30.) Therefore, plaintiffs have set forth sufficient allegations of civil conspiracy against defendants. *See Williams*, 69 F.Supp.2d at 655. Accordingly, defendants motion to dismiss Count II of plaintiffs' complaint will be denied.

D. Motion to Dismiss Plaintiffs' Punitive Damages Claims

Defendants move to dismiss plaintiffs' punitive damages claims against all defendants. (Brief in Support of Joint Motion to Dismiss, doc. 18 at 9-10.) Plaintiff concedes that punitive damages cannot be awarded against the Township but argues that claims for punitive damages may be maintained against the individual defendants. (Brief in Opposition to Joint Motion to Dismiss, doc. 19 at 9.)

Under 42 U.S.C. §1983, punitive damages cannot be awarded against a municipality, *City of Newport v. Fact Concerts*, 453 U.S. 247, 271, 101 S.Ct. 2748, 2762, 69 L.Ed.2d 616 (1981). Punitive damages may be awarded to punish violations of constitutional rights or deter similar future conduct by individual defendants. *Id.*; *Cochetti v. Desmond*, 572 F.2d 102 (3d Cir. 1978.) Such damages, however, are awarded only in cases in which a defendant's conduct transcends a bare violation of civil rights justifying compensatory damages or injunctive relief. *Id.* at 106. Therefore, in order to sustain a claim for punitive damages under Section 1983, a plaintiff must allege either that a defendant acted with actual knowledge that he or she was violating a constitutional right or that a defendant acted with reckless disregard of whether he or she was thus violating such a right. *See Id.* ("This test, requiring that the defendant acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so, seems to us appropriate.")

Plaintiffs presently allege that defendants knowingly restricted plaintiffs' development of the disputed property and, in doing so, violated plaintiffs' constitutional rights. (Amended Complaint, doc. 16 at ¶¶21-39.) Therefore, plaintiffs claim that defendants are liable for punitive damages under Section 1983. (*See Id.* at ¶¶47(b), 53(b)). As plaintiffs allege that defendant officials of the Township acted with actual knowledge that they were violating constitutional rights, their claim satisfies the standard for an award of punitive damages under Section 1983. *See Cochetti v. Desmond*, 572 F.2d 102 (3d Cir. 1978.) Therefore, defendants' motion to dismiss plaintiffs' claims for punitive damages will be denied.

E. Motion as to Qualified Immunity of Individual Defendants

Defendants argue that the individual defendants are entitled to a defense of qualified immunity with respect to plaintiffs' claims, as plaintiffs fail to allege that: 1) defendants are *not* entitled qualified immunity, or; 2) defendants violated clearly established federal law. (Brief in Support of Joint Motion to Dismiss, Doc. 18 at 11.) Plaintiffs counter that they are not required to plead the absence of qualified immunity and, in addition, defendants violated a clearly established law. (Plaintiff's Brief in Opposition to Defendants' Joint Motion to Dismiss, Doc. 19 at 8.)

Qualified immunity is an affirmative defense that must be pleaded by a defendant government official. *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982) (citing *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980)). Such immunity shields a defendant from personal liability for actions taken in his or her official capacity. *Id.* A governmental official, however, is entitled to qualified immunity "only insofar as [his or her] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (citing *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975)).

In addressing qualified immunity claims, the court must first ask whether a plaintiff's allegations set forth a violation of a constitutional right. *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818 (1999); *Assaf v. Fields*, 178 F.3d 170 (3d Cir. 1999).

If such a violation has been alleged, the court must determine whether the constitutional right asserted by the plaintiff is "clearly established" at the time of the defendant's action. *See Wilson*, 526 U.S. 603, 119 S.Ct. 1692, 1698. In determining if a right is "clearly established," the appropriate inquiry is whether a reasonable official would recognize that violation of the right is unlawful. *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) ("Clearly established ... means that the contours of the right must be sufficiently clear that a reasonable official would understand what he was doing violates that right.")

The United States Supreme Court has held that an individual has a constitutional due process right to freedom from arbitrary or irrational zoning actions. *Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977); *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1034-35 (3d Cir. 1987).

In the present case, defendants fail to establish an entitlement to qualified immunity. First, as qualified immunity is an affirmative defense, plaintiffs are not required to plead the absence of such immunity. *See Harlow*, 457 U.S. at 814, 102 S.Ct. at 2736. On the contrary, the defense must be raised by defendants in their pleading. *See Id.* In addition, plaintiffs allege that defendants violated their substantive due process rights under the Fifth and Fourteenth Amendments by imposing arbitrary and capricious zoning restrictions. (See Amended Complaint, doc. 16 at ¶41.) Case law establishes that such rights are "clearly established" for the purpose of a qualified immunity analysis. *See Wilson*, 526 U.S. 603, 119 S.Ct. 1692, 1698; *Arlington Heights*, 429 U.S. at 263, 97 S.Ct. at 562; *Pace Resources, Inc.* at 808 F.2d at 1034-35. Therefore, defendants' argument that plaintiffs fail to allege a violation of clearly established law must fail. Accordingly, defendants' motion for qualified immunity for the individual defendants will be denied.

II. Defendants' Motion for a More Definite Statement

Finally, defendants move for a more definite statement. (Brief in Support of Joint Motion to Dismiss, doc. 18 at 12.) Defendants argue that "[p]laintiffs should be required to frame a pleading which

addresses the acts or omissions of each [d]efendant ... as opposed to lumping them all together as if they were interchangeable parts." (*Id.*) In addition, defendants contend that plaintiffs have failed to set forth their claims in separate counts. (*Id.*)

Under Fed. R. Civ. P. 8(a)(2), "a pleading, ... shall contain ... a short and plain statement ... showing that the pleader is entitled to relief." If the complaint is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement ..." Fed. R. Civ. P. 12(e). Motions for more definite statements, however, are not viewed with favor. *Pitcavage v. Mesierecraft Boat Co.*, 632 F.Supp. 842, 849 (M.D.Pa. 1995) (citing *Wilson v. United States*, 585 F.Supp. 202 (M.D.Pa.1984)).

Here, plaintiffs clearly set forth the alleged acts of the Township and individual defendants, and the resulting violations of plaintiffs' Fifth and Fourteenth amended rights. (Amended Complaint, doc. 16 at ¶¶21-39.) Additionally, the complaint separates plaintiffs' claims into two counts. (*Id.* at ¶¶40 et al.) Therefore, I find that plaintiffs have complied with the pleading requirements under Fed. R. Civ. P. 8(a) and defendants are not entitled to a motion for a more definite statement. Accordingly, defendants' motion will be denied.

An appropriate order will follow.

Date: August 17, 2000

/s/A. Richard Caputo
A. Richard Caputo
United States District Judge

FILED
SCRANTON
AUG 17 2000
Per /s/illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 3:CV-00-0086

(JUDGE CAPUTO)

RICHARD C. ANGINO, ALICE K. ANGINO AND KING DRIVE CORP.,
Plaintiffs,
vs.
J. THOMAS VAN WAGNER, SMITH, RICHARD PEFFER, Individually and as Supervisors of MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO and METTE, EVANS &WOODSIDE, PC, MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer and LIGHT-HEIGEL & ASSOCIATES, INC.,
Defendants.

ORDER

NOW, this 17th day of August, 2000 it is hereby ORDERED that:

1) Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) is DENIED.

2) Defendants' Motion for a More Definite Statement under Fed. R. Civ. P. 12(e) is DENIED.

/s/A. Richard Caputo
A. Richard Caputo
United States District Judge

No. 02-1812

Supreme Court, U.S.
FILED
JUL 16 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

RICHARD C. ANGINO; ALICE K. ANGINO; and KING DRIVE CORP.,

Petitioners,

v.

J. THOMAS VAN WAGNER; JEFFERY SMITH; RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether the Appellate Court erred in affirming the Trial Court's alleged error in granting summary judgment based upon the ripeness doctrine as to Petitioners' entire civil rights action?

Whether the ripeness doctrine applies where a landowner alleges that a municipal body has passed an unconstitutional ordinance and has refused to amend it without the landowner presenting a formal administrative challenge under state law to the validity of the ordinance before the highest municipal decision making body?

Whether this Court should recognize futility as an exception to the ripeness doctrine?

CORPORATE DISCLOSURE STATEMENT

Respondent, Mette, Evans & Woodside, P.C., has no parent corporation nor does a publicly held company own any of the corporation's stock.

Respondent, Light-Heigel & Associates, Inc., has a parent corporation, AMPG, 430 East Main Street, Palmyra, Pennsylvania. No publicly held company owns more than 10 percent of the party's stock.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The named Petitioners and Respondents are identified in the Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

This petition arises from a suit asserted by landowners under 42 U.S.C. § 1983 against a political sub-division, its governing body, solicitor, and engineer, commenced in the United States District Court for the Middle District of Pennsylvania. Petitioners challenged the enactment and interpretation of various ordinances and the manner in which each Respondent has treated their land use applications. Pet., App. at 7a.

Although the second amended complaint raises due process and equal protection claims, for purposes of this petition, detailing these factual allegations serves no purpose. Instead, in summary, that complaint alleges that commencing in 1988 the Middle Paxton Township Board of Supervisors enacted and later interpreted certain land use ordinances which had the effect of precluding Petitioners from selling lots and/or developing their resort (known as Felicita). Pet., App. at 67a-68a. Further, Petitioners allege that all Respondents pursued the goal of an "antidevelopment 'legally defensible' comprehensive plan." Pet., App. at 71a. To reach this goal, in Petitioners' view, the Respondents all participated in:

- Enactment of a steep slopes ordinance to reduce the number of lots that can be developed (Pet., App. at 69a);
- Enactment of other changes in the zoning ordinance to limit development (Pet., App. at 69a);
- Enactment of standards in the land use ordinance to limit length of cul-de-sacs, road grades and radii (Pet., App. at 74a);
- Misinterpretation and selective enforcement of ordinances (Pet., App. at 74a); and

- Deprivation of the highest and best use of Petitioners' land (Pet., App. at 72a).

On March 16, 1998, the parties to this action, excepting Respondent Light-Heigel which was not a party there, settled a previous action brought by the Petitioners. Pet., App. at 47a. That settlement resolved, among other things, previous claims brought by the Petitioners under similar theories against most of these same Respondents in the same District Court. Pet., App. at 47a. That written settlement agreement includes a general release and resulted in that action being dismissed with prejudice. Pet., App. at 47a-48a.

Petitioners filed the present action in January 2000. On April 4, 2002, the District Court, per A. Richard Caputo, United States District Judge, granted summary judgment in favor of all Respondents without prejudice. Pet., App. at 14a. On December 17, 2002, a three judge panel of the United States Court of Appeals for the Third Circuit affirmed, finding that "the District Court engaged in a thoughtful analysis." Pet., App. at 2a. On March 13, 2003, that Court denied Petitioners' petition for rehearing with suggestion for rehearing *in banc*. Pet., App. at 6a.

This petition makes abundant references to a document styled "Plaintiffs' Summary of Undisputed Facts" submitted to the District Court. Petitioners state, "The following facts are undisputed." Pet., at 4. The statement is untrue and misleading to this Court. Petitioners' summary of undisputed facts before the District Court was not in compliance with Rule 56.1 of the Local Rules Of The United States District Court For The Middle District Of Pennsylvania, which provides as follows:

> A motion for summary judgment filed pursuant to Fed.R.Civ.P. 56, shall be accompanied by a separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried. *The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required in the foregoing paragraph, as to which it is contended that there exists a genuine issue to be tried.* Statements of material facts in support of, or in opposition to, a motion shall include references to the parts of the record that support the statements. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

Id. (emphasis added).

In responding to the motion for summary judgment, Petitioners were required to respond to the statement of material facts filed by the Respondents. They did not do so. Instead, they filed their own statement. Although that statement was in numbered paragraphs, they were not responsive to the statements of undisputed facts submitted by any of the Respondents. Therefore, the Respondents' statements were deemed admitted while Petitioner's were not. *See Williams Controls, Inc. v. Parente Randolph, Orlando, Carey & Associates*, 39 F. Supp.2d 517, 519 (M.D.Pa. 1999) (failure to file a separate, concise statement of facts responding to the numbered paragraphs set forth in moving party's statement of facts will be deemed admitted under Local Rule 56.1). Moreover, as an apparent consequence, both the District Court and the Court of

Appeals appear to have ignored Petitioners' so-called "Statement of Undisputed Facts."

Respondents submit that the facts relevant to this case are simply stated. Petitioners own approximately 700 acres in Middle Paxton Township, Dauphin County, Pennsylvania. Pet., App. at 47a. On that property are located a restaurant, an inn, an 18-hole golf course, an adjacent golf community, a lodge, and a spa. Pet., App. at 47a.

Over the years Petitioners have tried to develop their property by adding single-family residences and by expanding their resort. Pet., App. at 48a. Subsequent to the settlement on March 16, 1998, however, and until shortly before the District Court granted summary judgment, Petitioners never pursued any remedy available to them under Pennsylvania's Municipalities Planning Code, 53 P.S. § 10101 et seq., to challenge the validity of any ordinance, which they contend in their second amended complaint unduly and illegally restricts their land development. Pet., App. at 87a. They have never asked for variances from the applicable provisions of the zoning ordinance or pursued a validity challenge. Pet., App. at 87a-88a.

For example, Petitioners have complained at great length about the "steep slope" provisions of the zoning ordinance. Pet., App. at 69a. Not until shortly before the District Court granted summary judgment did Petitioners commence a validity challenge before the Respondent Board of Supervisors seeking a curative amendment from the "steep slope" provisions. Pet., App. at 105a-106a. The District Court granted summary judgment without prejudice, which provided the Petitioners the opportunity to proceed with the curative amendment process.

REASONS FOR DENYING THE WRIT

Petitioners raise three issues: 1) whether the Appellate Court erred in affirming the Trial Court's alleged error in granting summary judgment based upon the ripeness doctrine as to Petitioners' entire civil rights action; 2) whether the ripeness doctrine applies where a landowner alleges that a municipal body has passed an unconstitutional ordinance and has refused to amend it without the landowner presenting a formal administrative challenge under state law to the validity of the ordinance before the highest municipal decision making body; and 3) whether this Court should recognize futility as an exception to the ripeness doctrine. None of these issues satisfies the criteria under Rule 10 of this Court with respect to considerations governing review on certiorari. The Petitioners present no compelling reason for a grant of certiorari. They present no decision in conflict with the decision of any other Court on the same important matter nor does this decision depart "from the accepted and usual course of judicial proceedings." *Id.* Their first issue constitutes an alleged error of law. The second constitutes an attempt to revisit what is settled law in this Court. *See, e.g., Williamson Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). The third involves whether the law in the Ninth Circuit should become the law of this Court in an instance where the District Court has determine that the law in question does not apply factually.

I. The Circuit Court properly affirmed the grant of summary judgment, without prejudice, because Petitioners failed to avail themselves of state procedures for challenging Respondents' alleged actions and, thus, their claims were not ripe for adjudication.

Petitioners have articulated the initial question for review as being whether the Circuit Court erred in affirming the Trial Court's alleged error in granting summary judgment as to Petitioners' entire action based upon "ripeness" where that defense was first raised as an affirmative defense to Petitioners' second amended complaint and only as to additional civil rights violations resulting from the Township's adoption of its 2000 Zoning Ordinance. Pet., at i. While it is true that the Respondents did not raise ripeness (also referred to as the "doctrine of finality," *Williamson Planning Commission v. Hamilton Bank*, *supra*) as an affirmative defense in response to both the original and first amended complaints, it is undisputed that the Respondents did specifically plead ripeness in their respective responses to the second amended complaint. Respondent Light-Heigel's affirmative defenses to the second amended complaint stated, "Plaintiffs' *claims* are not *ripe* for disposition in this Court" (emphasis added). App. at 6b, paragraph 17, *infra*. Likewise, paragraph 14 of the affirmative defenses of the Respondent Middle Paxton Township parties to the second amended complaint stated, "Plaintiffs' *claims* are not *ripe* for hearing or disposition before this tribunal" (emphasis added). App. at 21b. While paragraph 19 of the affirmative defenses of the Respondent Ernico parties to the second amended complaint stated, "Plaintiffs' alleged *claims* are not *ripe* for hearing before this tribunal" (emphasis added). Pet., App. at 82a.

Contrary to Petitioners' assertion, all of the Respondents did plead the defense of ripeness as to all *claims* set forth in the second amended complaint and not "*only* as to *additional* civil rights violations resulting from the Township's *highest body's* adoption of its 2000 Zoning Ordinance." Petitioners' statement of the questions presented for review, Pet., at i. Consequently, the Respondents did not limit or restrict the defense of ripeness to the 2000 Zoning Ordinance but, rather, properly raised that defense as to *all claims* contained in the second amended complaint.

Petitioners represent that the "District Court rejected Defendants' 'ripeness' claim as to pre-November 2000 claims (117a-118a)." Pet., at 23. This is a misrepresentation of the record. On April 26, 2000, Respondents filed a joint motion to dismiss amended complaint and for a more definite statement. Pet., App. at 55a. In their supporting brief (App. at 24b-38b), filed May 8, 2000, Respondents argued that the amended complaint should be dismissed because, *inter alia*, Petitioners had failed to state claims under the Fifth and Fourteenth Amendments where there were adequate remedies under state law, the sole remedy being pursuant to 42 U.S.C.A. § 1983. The issue as raised and briefed by Respondents centered on a theory of failure to exhaust state remedies rather than ripeness, which theories are wholly distinct and separate. In that regard, the *Williamson* Court noted:

> While the policies underlying the two concepts overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and

> obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson, *supra*, 473 U.S. at 193, 105 S.Ct. at 3120, 87 L.Ed.2d at 143. The Respondents did not raise ripeness in their motion to dismiss and the District Court did not address the issue of ripeness in denying the motion. The Respondents only raised ripeness as an affirmative defense in response to the second amended complaint. Therefore, the District Court was not asked to address nor did it address the issue of ripeness until presented with Respondents' motions for summary judgment following the filing of the second amended complaint.

Petitioners' attempt to raise some type of waiver argument ignores the essential nature of the doctrine of ripeness or finality. Ripeness is a product of the concept of justiciability and concerns whether the legal issue at the time presented is sufficiently concrete for decision. *United States v. Lightcap*, 567 F.2d 1226, 1232 (3d Cir. 1977). This Court has noted "that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, 113 S.Ct. 2485, 125 L.Ed.2d 38, n.18 (1993). A District Court may decide the ripeness issue upon motion without submitting it to a jury for factual findings. *Warner Cable Com. v. Borough of Schuylkill Haven*, 784 F. Supp. 203, 205-206 (E.D. Pa. 1992). In fact, it has been recognized that considerations of ripeness are sufficiently important that Courts must raise the issue *sua sponte* even if the parties do not. *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535 (3d Cir. 1988).

II. Petitioners were properly directed to participate in an administrative procedure to reach a final determination as to how the governing authority will apply its land use ordinance to Petitioners' real estate in order to satisfy the "ripeness" requirement.

Petitioners' claims in their complaint and amended complaints are essentially due process claims, that is, that the ordinances of Middle Paxton Township "go too far." *Williamson, supra*, 473 U.S. at 200, 105 S.Ct. at 3123, 87 L.Ed.2d at 147, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Thus, Petitioners are attacking the validity of those ordinances. In Pennsylvania the ultimate decision-makers at the administrative level on validity are: (a) the zoning hearing board or (b) the township supervisors in a curative amendment proceeding. Pennsylvania Municipalities Planning Code, § 916.1, 53 P.S. § 10916.1. Pet., App. at 10a. As noted by the District Court, Petitioners did not submit their claims to either body before starting suit. *Id.* In addition, under Pennsylvania law variances are granted by the political subdivision's zoning hearing board. Pennsylvania Municipalities Planning Code, § 909.1(a)(5), 53 P.S. § 10909.1(a)(5). Petitioners have never sought variances either. Pet., App. at 87a-88a.

As Petitioners admit, however, they eventually did challenge the validity of the ordinance by filing a curative amendment proceeding before the board of supervisors on February 27, 2002. Pet., at 23. That matter is still pending. In other words, Petitioners finally realized that they should follow Pennsylvania law with regard to obtaining a decision by the highest decision making body in the municipality.

Despite this, Petitioners continue their challenge of the dismissal of their action, stating:

> "Prior to this case the Third Circuit limited the 'ripeness' doctrine to administrative decisions of low level officials and not to ordinances adopted by the highest legislative bodies after legislative drafts, final drafts, meetings, and hearings."

Pet., at 23. Petitioners rely on four cases to support this argument: *New Hanover Township v. United States Corps of Army Engineers*, 992 F.2d 470 (3d Cir. 1993); *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3d Cir. 1993); *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993); and *Sameric Corporation of Delaware v. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998). Pet., at 23-24, 29. None of these cases support Petitioners' position.

The seminal case on ripeness is *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, *supra*. There this Court considered whether, "petitioners' application of various zoning laws and regulations to respondents' property amounted to a 'taking' of that property." 473 U.S. at 175, 105 S.Ct. at 3111, 87 L.Ed.2d at 132. In *Williamson*:

> Respondent has submitted a plan for developing its property. . . . But . . . respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning

> ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%. [citations omitted]. The Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road-grade, and frontage requirements. Indeed, the Temple Hills Committee had recommended that the Commission grant variances from those regulations. [citation omitted]. Nevertheless, respondent did not seek variances from either the Board or Commission.

473 U.S. at 187-188, 105 S.Ct. at 3117, 87 L.Ed.2d at 139-140. Based on these facts, this Court found that the case was not ripe because:

> [A]s the court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe *until the government entity charged with implementing the regulations has reached a final decision* regarding the application of the regulations to the property at issue.

473 U.S. at 186, 105 S.Ct. at 3116, 87 L.Ed.2d at 139 (emphasis added). As Petitioners concede, ripeness is not the same as exhausting administrative remedies. Pet., at 26-27. As this Court noted:

> Resort to those procedures would result in a judgment whether the commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its

> subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

473 U.S. at 193, 105 S.Ct. at 3120, 87 L.Ed.2d at 143.

Though *Williamson* is primarily a takings case, it also analyzed the issues under a due process theory. This Court concluded:

> We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. *That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property*. No such decision had been made at the time respondent filed its § 1983 action, because respondent failed to apply

> for variances from the regulations. (emphasis added)

473 U.S. at 200, 105 S.Ct. at 3123, 87 L.Ed.2d at 148.

The District Courts and the Courts of Appeals have consistently followed *Williamson*, including the cases cited by Petitioners. Petitioners allege, "the Third Circuit panel decision in this case is in conflict with the prior decisions of the Third Circuit [citations omitted] as to what types of decisions are final and 'ripe.'" Pet., at 29. The first case cited is *New Hanover Township, supra*. There, the Corps of Army Engineers had granted a permit for a municipal waste landfill pursuant to a nationwide permit. The Court held that the case was not ripe and vacated the District Court's order granting the Corps' summary judgment motion. 992 F.2d at 472.

Ripeness was an issue because the landfill required a water quality certificate from the Pennsylvania Department of Environmental Resources (PADER). The Third Circuit concluded:

> A pragmatic view of the facts mandates a decision that this case is not ripe for review. First and foremost, the Corps' decision has no immediate impact on the Township. NHC may not proceed with its landfill project until it obtains a section 401 water quality certificate from the PADER. Thus, no one will experience any impact stemming from the Corps' decision until and unless PADER issues a water quality certificate.

992 F.2d at 472-473.

In short, because no decision had been made by the highest decision making body, the case was not ripe for adjudication. Contrary to Petitioners' assertion, the case

clearly does not stand for the proposition that the decision of a lower level official makes a case sufficiently ripe for federal consideration.

In *Taylor, supra*, plaintiff's tenant had obtained a use permit to operate a sports fitness center. Certain work on the building had to be performed. The tenant opened for business before the work was completed. The business was shut down and the permit revoked because the tenant had furnished false and misleading information on his application. 983 F.2d at 1285. Plaintiff sued and, on appeal, the Circuit Court articulated the process plaintiff should have followed:

> Plaintiffs did not reapply for a use permit, appeal the revocation to the Township Zoning Board, or seek a variance or special exception to the Township's zoning ordinances. Each of these options was available to plaintiffs under the Township's zoning ordinance and Pennsylvania's Municipal Planning Code. The zoning hearing board has exclusive jurisdiction to render a "final adjudication" regarding any decision of the zoning officer, such as revocation of a use permit. Pa.Stat.Ann. tit. 53, § 10909.1(a)(3). The zoning hearing board also has exclusive jurisdiction to grant variances and special exceptions to the zoning ordinance. Ordinance § 1600; *see also* Pa.Stat.Ann. tit. 53, §§ 10910.2 & 10912.1. The zoning hearing board would have been required to hold a hearing on plaintiffs' appeal or request for a variance or special exception within sixty days of filing and to render a decision within forty-five days of the hearing. Pa.Stat.Ann. tit. 53, § 10908(1.2). Failure to take action on plaintiffs' request for relief would have resulted in deemed approval of the request. Pa.Stat.Ann. tit. 53, § 10908(9).

983 F.2d at 1285.

After a careful analysis of the facts, including a discussion of *Williamson*, the Third Circuit disposed of plaintiff's due process claim holding:

> In *Williamson* and *MacDonald*, [*Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285, *reh'g denied*, 478 U.S. 1035, 107 S.Ct. 22, 92 L.Ed.2d 773 (1986)], however, the Supreme Court did not ignore the fact that certain land-use decisions may cause injury. Rather, in the face of potential constitutional injuries, the Court held that the local authority should be given the opportunity to fully and finally determine the scope of the injury before federal claims ripen . . . although plaintiffs may, at some point, have a mature and colorable claim because of the township's actions – assuming they had a property interest in the permit at all – *Williamson* and *MacDonald* require that plaintiffs allow local authorities to act with finality under the zoning ordinance before pursuing a due process claim.

983 F.2d at 1294.

The Third Circuit also disposed of the plaintiff's equal protection claim by stating:

> Like a takings claim, the injury – dissimilar and irrational treatment – ripens only after the zoning hearing board takes final and definitive action through its variance or review procedures. Because plaintiffs resorted to neither, their equal protection claim is not ripe for judicial review.

983 F.2d at 1295.

Petitioners' third case, *Acierno*, *supra*, is a case decided under Delaware, not Pennsylvania, law. There, the

applicant twice submitted plans to the County Development and Licensing Division. They were denied. Neither was appealed. The applicant then filed suit in the U.S. District Court. The defendants appealed the denial of their motion for summary judgment and the granting of plaintiffs' motion for injunction to the Third Circuit. The issue was whether a final decision had been made.

Contrary to Petitioners' position, *Acierno* does not stand for the proposition that a cause of action is ripe upon a decision by a lower level official. Rather, the Court held:

> We agree the County has made a final decision with respect to plaintiffs' development plans. Plaintiff submitted three plans depicting commercial development on the M-1 portion of the property. The Department of Planning and the County Council accepted those plans, which are final decisions under state law and the county zoning ordinance.

6 F.3d at 975.

Obviously, in *Acierno* the decision was made at county level, not by some lower level functionary.

Petitioners' final case, *Sameric*, *supra*, is quoted at length in the Petition. Pet., at 24-25. The quoted material cited by Petitioners does not support their position. That quotation refers to a "*Final determination* regarding how to construe the applicable ordinances and apply them to a particular property." Pet., at 25. 142 F.3d at 597 (emphasis added). The *Sameric* Court concluded, "that the Department of Licenses denial was *not* the city's final determination of Sameric's rights to a demolition permit under the ordinances." 142 F.2d at 597 (emphasis added).

Clearly, the District Court was correct when it cited *Sameric* and concluded that Petitioners' claims were not ripe. Pet., App. at 7a-14a. The Third Circuit was, therefore, correct in affirming. It follows that this Court should deny the Petition.

III. "Futility" does not apply as an exception to the ripeness doctrine in the instant case because the record does not support that exception.

The Third Circuit has not adopted the futility rule in land use cases. Simply stated, that rule is that if the record in a given case demonstrates the futility of pursuing the matter to a final decision the issue may be ripe for disposition. The two lead cases on this subject appear to be from the Ninth Circuit, *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989) and *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), *aff'd on other grounds*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

In *Hoehne*, the District Court had dismissed the plaintiffs' complaint as premature. The Ninth Circuit reversed finding that the actions of the governmental body in denying a subdivision application and then rezoning the land to make it impossible for the owners to subdivide constituted a sufficient final decision so as to make any further applications to the governmental body futile.

In *Del Monte Dunes*, the applicant submitted four variations of the same plan for approval. Each time they were rejected. On three occasions the planning commission made suggestions or the City suggested changes and when plans were modified to meet these suggestions, they were still rejected. The *Del Monte Dunes* Court stated the

requirements for meeting its futility exception to the finality rule as follows:

> The taking component of an as applied claim is not ripe until the local government issues a final decision on the application of land use regulations to the affected property. *Id.* The cases of this circuit and the Supreme Court have identified two areas of concern that illuminate and define the finality requirement. *Finality first requires the rejection of development formally sought by the landowner. At a minimum, the landowner must submit one formal development plan and seek a variance from any regulations barring the development proposed in the plan.* Finality also requires the local government to determine authoritatively the type and intensity of development that land use regulations will allow on the subject property; such a determination helps a court to evaluate whether regulation of the subject property is excessive by identifying the extent of the regulation. Thus, a landowner may need to resubmit modified development proposals that satisfy the local government's objections to the development as initially proposed.
>
> This circuit recognizes a limited futility exception to the requirement that a landowner obtain a final decision regarding the application of land use regulations to the affected property. Under this exception, the resubmission of a development plan or the application for a variance from prohibitive regulations may be excused if those actions would be idle or futile. *The landowner bears the burden of establishing, by more than mere allegations, the futility of pursuing any of the steps needed to obtain a final decision.* Moreover, before claiming the exception, the landowner must

> submit at least one development proposal and one application for a variance if meaningful application and submission can be made.

920 F.2d at 1502 (citations omitted) (emphasis added).

Petitioners could not meet this test before the District Court. They had not submitted any plan that has been denied because of the provision of the township's zoning ordinance, let alone repeated plans. They had not asked for a variance. As the lower Court concluded, "Even if this doctrine is recognized in this circuit, Plaintiffs have not met the *Del Monte* requirements." Pet., App. at 12a. In short, even if this Court adopts the *Hoehne* and *Del Monte Dunes'* futility exception, it does not apply to the Petitioners here.

Evidently, Petitioners believe that they can meet the futility standard by citing the letters written by them to the Respondent Supervisors. The "Statement of Facts" in the Petition lists and quotes extensively from five obviously self-serving letters written by Petitioner Richard Angino in 2000 and 2001 accusing the Respondent Supervisors of enacting a number of illegal ordinances. Pet., at 15-21. Petitioners also quote a November 9, 2001 reply from the Respondent Solicitor, presumably to demonstrate that further efforts to file a plan or seek variances, or more importantly, to challenge validity, would be pointless. Pet., at 21.

As *Del Monte Dunes* states:

> This circuit recognizes a limited futility exception to the requirement that a landowner obtain a final decision regarding the application of land use regulations to the affected property. . . . Under this exception, *the resubmission of a development*

> *plan or the application for a variance* from prohibitive regulations may be excused if those actions would be idle or futile.

920 F.2d at 1501 (emphasis added). Letters are not a sufficient substitute for actually submitting a plan or a request for a variance and having official action taken. As *Del Monte Dunes* also states:

> The landowner bears the burden of establishing, *by more than mere allegations*, the futility of pursuing any of the steps needed to obtain a final decision.

920 F.2d at 1501 (emphasis added).

In view of the foregoing, consideration of whether this Court should adopt the "futility" exception to land use cases would not alter the outcome to Petitioners' claims.

CONCLUSION

The Petition should be denied for the reasons and authority stated above.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD C. ANGINO, ALICE K. ANGINO, and KING DRIVE CORP., Plaintiffs,	:	CIVIL ACTION – LAW
	:	No. 1:CV 00-0086
	:	Judge Caputo
v.	:	
J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC., Defendants.	:	

ANSWER OF LIGHT-HEIGEL & ASSOCIATES, INC. TO SECOND AMENDED COMPLAINT

1-13. Admitted on information and belief except that Light-Heigel & Associates, Inc. (Light-Heigel) has no knowledge of whether the action is brought against individuals in both personal and official capacities or whether any person named in the Second Amended Complaint is acting within the scope of his or her employment.

14. Admitted.

15. Admitted.

16-79. Denied. As Plaintiffs well know, Light-Heigel was not involved in any of the following:

(a) The prior lawsuit.

(b) The preparation and enactment of the 1998 Comprehensive Plan.

(c) The preparation and enactment of the 2000 Zoning Ordinance.

(d) The preparation and enactment of the Steep Slope Ordinance adopted in 1988 and amended in 1991.

(e) Minimum lot size requirements.

(f) Cul-de-sac requirements.

(g) Road grade percentage.

By way of further answer, as to Paragraph 71, Light-Heigel was not found guilty of bad faith by Judge Turgeon in the Court of Common Pleas of Dauphin County.

80. Denied that Light-Heigel has engaged in any illegal, discriminatory, constitutionally violative practice at any time.

(a)-(j) These allegations are directed at other Defendants and not at Light-Heigel.

COUNT I

81. Light-Heigel incorporates its answers to Paragraphs 1 through 80 by reference.

82. Denied that any conduct on the part of Light-Heigel has deprived Plaintiffs of any federally protected rights, constitutional due process, equal protection or other property rights granted by the Federal and State Constitutions and their laws.

83. Denied that any conduct on the part of Light-Heigel has deprived Plaintiffs of any federally protected rights in either an individual or official capacity because Light-Heigel is a private entity and was incapable of acting under color of state law. Denied that any conduct on the part of Light-Heigel has caused Plaintiffs any damages.

84. Denied that any conduct on the part of Light-Heigel has deprived Plaintiffs of any of the additional damages described in this paragraph.

85. Denied that any conduct on the part of Light-Heigel has deprived Plaintiffs of any constitutionally protected or any other rights and, therefore, denied that any conduct on the part of Light-Heigel is outrageous, intentional, or punitive or was taken with reckless indifference to Plaintiffs' rights.

86. Denied that any conduct on the part of Light-Heigel has forced Plaintiffs to spend attorney time or incur expense in this or any other action.

WHEREFORE, Light-Heigel & Associates, Inc. requests that as to it Plaintiffs' Second Amended Complaint be dismissed.

AFFIRMATIVE DEFENSES

1. Plaintiffs have failed to state a cause of action upon which they may obtain relief.

2. All denials of approval of land development and subdivision plans submitted by Plaintiffs with which Light-Heigel has any connection resulted from Plaintiffs' failure to comply with the applicable ordinances and other laws governing zoning and development in Middle Paxton Township.

3. Light-Heigel was not a party to the prior lawsuit described in Paragraph 20 of the Second Amended Complaint.

4. Light-Heigel was not a party to the Settlement Agreement of the prior lawsuit described in Paragraphs 21 and 22 of the Second Amended Complaint.

5. Light-Heigel is not and cannot be in violation of any of the provisions of the Settlement agreement described in Paragraphs 21 and 22 of the Second Amended Complaint.

6. As Township Engineer, Light-Heigel has no power to approve or deny land development and subdivision plans, to enact or not enact ordinances, or to impose any policies on the Township and its Board of Supervisors.

7. Light-Heigel is a private entity and, therefore, cannot and has not acted under color of state law.

8. Light-Heigel did not participate in the preparation and enactment of an amendment to the Middle Paxton Township Zoning Ordinance in 1988 defining steep slopes as described in Paragraph 33 of the Second Amended Complaint.

9. Light-Heigel did not participate in the preparation and enactment of an amendment to the Middle Paxton Township Zoning Ordinance in 1991 with regard to defining steep slopes and requiring certain minimum lot areas in connection therewith as alleged in Paragraph 34 of the Second Amended Complaint.

10. Light-Heigel did not participate in the preparation and enactment of any amendments to the Middle Paxton Township Zoning Ordinance with respect to minimum lot area as described in Paragraph 35 of the Second Amended Complaint.

11. Light-Heigel did not participate in the preparation and enactment of a Comprehensive Plan in 1998 by Middle Paxton Township.

12. Light-Heigel did not participate in the preparation and enactment of a Zoning Ordinance in 2000 by Middle Paxton Township.

13. Light-Heigel did not participate in the preparation and enactment of any amendments to the Middle Paxton Township Zoning Ordinance with respect to minimum road grade percentage.

14. Some or all of Plaintiffs' claims are barred by the applicable statute of limitations.

15. Some or all of Plaintiffs' claims are barred by the provisions of the Settlement Agreement of the prior lawsuit.

16. Plaintiffs have failed to exhaust available state remedies.

17. Plaintiffs' claims are not ripe for disposition in this Court.

18. At all times, Light-Heigel has properly carried out its duties as Township Engineer pursuant to the terms of the Second Class Township Code.

WHEREFORE, Light-Heigel & Associates, Inc. respectfully requests that as to it Plaintiffs' Second Amended Complaint be dismissed.

HARTMAN UNDERHILL & BRUBAKER LLP

By: /s/ Christopher S. Underhill
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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD C. ANGINO, ALICE K. ANGINO and KING DRIVE CORP., Plaintiffs	CIVIL ACTION – LAW
v.	NO. 1:CV-00-0086
J. THOMAS VAN WAGNER, JEFFERY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO, METTE, EVANS & WOODSIDE, P.C., MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer, and LIGHT-HEIGEL & ASSOCIATES, INC., Defendants.	JUDGE CAPUTO JURY TRIAL DEMANDED

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS J. THOMAS VAN WAGNER, JEFFERY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP and MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer, TO PLAINTIFFS' SECOND AMENDED COMPLAINT

1. Denied.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted with correction. The Defendant's first name is spelled "Jeffery".

8. Admitted.

9. Admitted in part, denied in part. To the extent it is being alleged that the Defendant Supervisors are liable upon the claims asserted in either their personal or official capacities, said allegations are specifically denied. The remaining allegations are admitted.

10. Admitted in part, denied in part. To the extent it is being alleged that Defendant Davis is liable upon the claims asserted in either her personal or official capacity, said allegations are specifically denied. The remaining allegations are admitted.

11. Admitted.

12. Admitted in part, denied in part. It is denied that Defendant Ernico is the Township solicitor. To the contrary, at all times relevant hereto, Defendant Ernico was the solicitor to the Board of Supervisors of Middle Paxton Township. The remaining allegations are admitted.

13. The allegations are conclusions of law and/or fact to which no answer is required.

14. The allegations are directed to a party other than the answering Defendants and, therefore, no answer is required.

15. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

16. Admitted.

17. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

18. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

19. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

20. Denied. The Amended Complaint filed to No. 1-CV-97-1265, attached as an exhibit to the original Complaint and Amended Complaint in the instant action, is a written document which speaks for itself and, therefore, any attempt to characterize, summarize, paraphrase or interpret it is denied.

21. Admitted.

22. Denied. The Settlement Agreement is a written document which speaks for itself and, therefore, any attempt to characterize, summarize, paraphrase or interpret it is denied.

23. Denied.

24. Admitted in part, denied in part. It is admitted that the Supervisors of Middle Paxton Township (hereinafter "the Supervisors") have adopted zoning and land development amendments, the 2000 Zoning Ordinance, and a

proposed new Subdivision Ordinance. The remaining allegations are denied.

25. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

26. Admitted.

27. Admitted.

28. Admitted in part, denied in part. It is admitted that Stan Custer obtained approval from the Township to utilize an on-site sewage package treatment plant. The remaining allegations are denied. By way of further answer, Middle Paxton Township (hereinafter "the Township") neither approved or disapproved the slope of driveways, and it is believed that the Township did not approve construction of a public access road in excess of 10%.

29. Admitted in part, denied in part. It is admitted that Cameron Geisel obtained a waiver from the 500 foot cul-de-sac limitation. The remaining allegation is denied as the 1,280 foot figure is the combined length of two (2) streets.

30. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations as the phrases "relatively near" and "similar mountainside terrain" are too indefinite.

31. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

32. Denied. The Dresdner Comprehensive Plan is a written document which speaks for itself and any attempt

to characterize, summarize, paraphrase or interpret it is denied.

33. Admitted in part, denied in part. It is admitted that the Township adopted a steep slope ordinance in 1988. The remaining allegations are denied as they purport to characterize, summarize, paraphrase or interpret written documents, i.e. the 1988 steep slope ordinance and the Dresdner Comprehensive Plan, which speak for themselves. The remaining allegations are denied.

34. Admitted in part, denied in part. It is admitted that the Township adopted an ordinance which defined steep slopes as being 12%, 15% and 18% and which required three, five and ten acres, respectively, for each lot. The remaining allegations are denied.

35. Denied. The allegations relate to written documents, i.e. ordinances, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

36. Admitted.

37. Denied. The allegations relate to written documents, i.e. questionnaires, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

38. Admitted in part, denied in part. It is admitted that the Township adopted a Comprehensive Plan in 1998 and a Zoning Ordinance. The remaining allegations are denied.

39. Denied.

40. Admitted.

41. Denied. The answering Defendants are unable to admit the allegation as the map referred to has not been specifically identified.

42. Denied. The answering Defendants are unable to admit the allegation as the map referred to has not been specifically identified.

43. Denied. The answering Defendants are unable to admit the allegation as the map referred to has not been specifically identified.

44. Denied.

45. Admitted in part, denied in part. It is admitted that the Supervisors, as the governing body of the Township, are vested with the sole authority to adopt and amend comprehensive plans, including the establishment of zoning districts and zoning boundary lines, by resolution in accordance with the Municipalities Planning Code. The remaining allegations are denied.

46. Admitted in part, denied in part. It is admitted that the 2000 Zoning Ordinance resulted in some portion of Plaintiffs' property being classified as agricultural/residential low density. The remaining allegations are denied.

47. Denied. The allegations relate to written documents, i.e. ordinances, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied. The remaining allegations are denied.

48. Denied. The allegations concerning the Municipalities Planning Code's recommendations are conclusions of law and/or fact to which no answer is required and they are, therefore, denied. The remaining allegations relate to

written documents, i.e. comprehensive plans and zoning ordinances, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

49. Denied. The allegations relate to written documents, i.e. comprehensive plans and zoning ordinances, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied. The remaining allegations are denied.

50. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

51. Admitted in part, denied in part. It is admitted that the 2000 Zoning Ordinance contains a steep slope overlay which requires three acres for 12% slopes, five acres for 15% slopes and ten acres for 18% or greater slopes. The remaining allegations are denied.

52. Denied. The Dauphin County 1992 Comprehensive Plan is a written document which speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied.

53. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

54. Denied.

55. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

56. Denied.

57. Denied.

58. Admitted in part, denied in part. It is admitted that Defendant Ernico authored the letter of October 27, 1997 in response to the letter of Charles Guttenplan, Exhibits "A" and "B", respectively, to the Second Amended Complaint. The letters are written documents which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

59. Denied. The 1998 and the 1987 Comprehensive Plans are written documents which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

60. Denied. The 1992 Comprehensive Plan of Dauphin County is a written document which speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied.

61. Denied. The Comprehensive Plan and Zoning Ordinance of Lower Paxton Township are written documents which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

62. Denied. The allegations relate to various written documents, i.e. zoning ordinances of contiguous townships, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

63. Denied. The allegations relate to various written documents which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

64. Admitted in part, denied in part. It is admitted that the steep slope provisions in the Township's 2000 Zoning

Ordinance is an overlay. The remaining allegations are denied.

65. Denied. It is specifically denied that the answering Defendants have acted in a manner that is arbitrary, capricious and/or discriminatory over the past decade and/or through the 1998 Comprehensive Plan and 2000 Zoning Ordinance. The remaining allegations are conclusions of law and/or fact to which no answer is required.

66. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

67. Denied. The allegations are conclusions of law and/or fact to which no answer is required.

68. Denied. By way of further answer, the 2000 Zoning Ordinance defines "resort".

69. Denied.

70. Denied. It is specifically denied that the answering Defendants have singled out or discriminated against the Plaintiffs.

71. Denied. The allegation relates to an Order issued by Judge Turgeon and a subsequent decision of the Commonwealth Court which are written documents that speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

72. Denied. The allegation relates to a determination by the Arbitrator which is a written document that speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied.

73. Denied. The allegation relates to a determination of the Court of Common Pleas of Dauphin County which is a written document that speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied. By way of further answer, the order was subsequently withdrawn.

74. Denied. It is denied that the district justice reversed the closure, but rather simply found Plaintiff Richard Angino not guilty of a summary offense, a determination from which the Township had no right of appeal.

75. Admitted in part, denied in part. It is admitted that the Supervisors brought a petition against Plaintiffs for breaching the Settlement Agreement. The remaining allegations relate to a written document, i.e. the court's Order, which is a written document that speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied.

76. Denied.

77. Denied.

78. Denied.

79. Admitted in part, denied in part. It is admitted that the Supervisors have, on occasion, elected not to follow the recommendations of the Township's Planning Commission on matters related to various plans that have been submitted to it for approval due to non-compliance with applicable ordinances. The remaining allegations are denied.

80. Denied. It is specifically denied that the answering Defendants have acted illegally toward, have discriminated against or have violated the constitutional rights of the plaintiffs.

a.) Denied;

b.) Admitted in part, denied in part. It is admitted that the Supervisors have refused to consider a waiver of Straw Hollow Road width to 16 or 18 feet because the Plaintiffs agreed to a different width in the Settlement Agreement. The remaining allegation is denied;

c.) Admitted in part, denied in part. It is admitted that the Supervisors have required a width of 22 feet for the existing Straw Hollow Road rather than a width of 16 or 18 feet because the Plaintiffs agreed to the 22 foot width in the Settlement Agreement. It is denied that there is, or should be, any correlation between the width of pre-existing roads and the width of Straw Hollow Road;

d.) Admitted in part, denied in part. It is admitted that the Township has a budget surplus. The remaining allegations are denied. The allegations concerning the 1998 Comprehensive Plan are denied as they relate to a written document which speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it are denied. By way of further answer, the Comprehensive Plan contains an Action Plan, a portion of which relates to highways and circulatory systems, with a recommendation that it be re-evaluated annually. Furthermore, the Township has undertaken to repave and improve certain Township roads during the year 2001 and is attempting to obtain State funds for other such improvements;

e.) Denied. It is admitted, however, that the 2000 Zoning Ordinance requires road widths which may be generally wider than some existing state and township roads within the Township;

f.) Denied. It is specifically denied that the Supervisors have used the Comprehensive Plan to preclude development;

g.) Denied. It is admitted, however, that the Supervisors granted a waiver to Verizon on or about August 2, 2001. It is denied that Defendant Mette Evans represented Verizon in that application, although it had represented Verizon in other matters, which fact was disclosed. It is further denied that Defendant Ernico participated in any way at the hearing on the application. Moreover, it is denied that Verizon's application was substantially similar to any application submitted by the Plaintiffs;

h.) Denied as stated. It is admitted, however, that Defendant Van Wagner stated that permitting the *specific* waivers requested by the Plaintiffs at the August 2, 2001 meeting would not be appropriate because he had never voted to approve the same waivers when requested by others. It is denied that Defendant Van Wagner made a blanket or general statement that waivers should never be granted or that waivers should never be granted to the Plaintiffs;

i.) Denied as stated;

j.) Denied as stated.

42 U.S.C. §1983
Due Process – Equal Protection
Pennsylvania Constitutional Violations

81. The answers set forth above in Paragraphs 1 through 80 are incorporated herein by reference.

82. Denied. It is specifically denied that the answering Defendants have acted to deprive the Plaintiffs of their federally protected constitutional due process and equal protection and other property rights.

83. Denied. It is specifically denied that the answering Defendants have acted to deprive the Plaintiffs of their federally protected rights. The remaining allegations are denied on the basis that the answering Defendants are without knowledge or information sufficient to form a belief as to the truth thereof and proof is demanded.

84. Denied. It is specifically denied that the answering Defendants have engaged in conduct to deprive Plaintiffs of their federally protected rights. The remaining allegations are denied on the basis that the answering Defendants are without knowledge or information sufficient to form a belief as to the truth thereof and proof is demanded.

85. Denied. It is specifically denied that the answering Defendants have engaged in conduct that is outrageous, intentional, punitive and undertaken with reckless indifference toward the Plaintiffs' rights.

86. Denied. It is specifically denied that the answering Defendants have violated Plaintiffs' civil rights. The remaining allegations are denied on the basis that the

answering Defendants are without knowledge or information sufficient to form a belief to the truth thereof and proof is demanded.

WHEREFORE, Defendants J. Thomas Van Wagner, Jeffery Smith and Richard Peffer, individually and as Supervisors of Middle Paxton Township, Middle Paxton Township, and Mary Jane Davis, individually and as Middle Paxton Township Codes Enforcement Officer, demand judgment in their favor and against Plaintiffs.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Second Amended Complaint fails to set forth causes of action upon which relief may be granted against the answering Defendants.

2. The answering Defendants have not deprived or engaged in conduct intended to deprive Plaintiffs of their federally protected rights.

3. The answering Defendants have not deprived or engaged in conduct intended to deprive the Plaintiffs of their state protected rights.

4. The answering Defendants have not conspired or engaged in conduct, together or with others, intended to deprive Plaintiffs of their federally or state protected rights.

5. The answering Defendants have not violated or breached the terms of the Settlement Agreement referenced in the Second Amended Complaint.

6. The answering Defendants have not imposed arbitrary, capricious or unreasonable conditions upon the development of Plaintiffs' land.

7. The answering Defendants have acted in accordance with applicable ordinances, the Municipalities Planning Code, and sound engineering and land development principles in imposing conditions upon the development of Plaintiffs' land.

8. Plaintiffs have adequate remedies under state law which they have failed to exhaust.

9. Plaintiffs' Second Amended Complaint fails to set forth any racial or class-based animus to support a cause of action under 42 U.S.C. §1905(3).

10. The Second Amended Complaint fails to set forth causes of action upon which punitive damages may be awarded.

11. Punitive damages may not be awarded against Middle Paxton Township, the Middle Paxton Board of Supervisors, the individual Supervisors or the Codes Enforcement Officer in their official capacities.

12. The Individual Defendants are entitled to qualified immunity.

13. Plaintiffs lack standing to assert any claims against the answering Defendants.

14. Plaintiffs' claims are not ripe for hearing or disposition before this tribunal.

15. As a result of the Settlement Agreement referenced in the Second Amended Complaint, the answering Defendants are released from all or some of the claims for damages.

16. Some or all of Plaintiffs' claims are barred by the applicable statutes of limitations.

17. Defendant Mary Jane Davis, as the Codes Enforcement Officer, had no power or authority to enact zoning ordinances, subdivision and land development ordinances or comprehensive plans.

18. Defendant Mary Jane Davis, as the Codes Enforcement Officer, had no power or authority to grant waivers or exceptions or to approve or disapprove land development and/or subdivision plans submitted by the Plaintiffs.

19. Defendant Jeffery Smith did not become a member of the Middle Paxton Township Supervisors until January 1998 and he participated in his first official meeting as a Supervisor on January 5, 1998.

20. Defendant Jeffery Smith had no power or authority to enact zoning ordinances, subdivision and land development ordinances or comprehensive plans prior to January 5, 1998.

21. Defendant Jeffery Smith had no power or authority to grant waivers or exceptions or to approve or disapprove land development and/or subdivision plans submitted by the Plaintiffs prior to January 5, 1998.

22. The answering Defendants reserve the right to amend their affirmative defenses in accordance with applicable law, rules of procedure and the Court's Case Management Plan.

WHEREFORE, Defendants J. Thomas Van Wagner, Jeffery Smith and Richard Peffer, individually and as Supervisors of Middle Paxton Township, Middle Paxton Township, and Mary Jane Davis, individually and as

Middle Paxton Township Codes Enforcement Officer, demand judgment in their favor and against Plaintiffs.

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ATTORNEYS FOR DEFENDANTS J. THOMAS VAN WAGNER, JEFFERY SMITH, RICHARD PEFFER, individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP and MARY JANE DAVIS, individually and as Middle Paxton Township Codes Enforcement Officer

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD C. ANGINO, ALICE K. ANGINO AND KING DRIVE CORP.,	:	**NO. 1:-CV-00-0086**
	:	**JUDGE**
	:	**YVETTE KANE**
Plaintiffs.	:	
v.	:	
J. THOMAS VANWAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, PC., MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer and LIGHT-HEIGEL & ASSOCIATES, INC.,	:	
Defendants	:	

BRIEF IN SUPPORT OF JOINT MOTION OF DEFENDANTS VANWAGNER, SMITH, PEFFER, MIDDLE PAXTON TOWNSHIP, ERNICO, METTE, EVANS & WOODSIDE, P.C. AND DAVIS TO DISMISS AMENDED COMPLAINT AND/OR FOR A MORE DEFINITE STATEMENT

(Filed May 8, 2000)

I. PROCEDURAL HISTORY AND STATEMENT OF FACT:

On or about January 17, 2000, Plaintiffs commenced this civil action by filing a Complaint in which they

attempted to assert various claims under the Fourteenth Amendment of the United States Constitution, the Fifth Amendment of the United States Constitution, 42 U.S.C.A. § 1983, 42 U.S.C.A. § 1985(3) and unspecified pendent state law claims. These claims arise out of a land use dispute that was previously before this court at civil action number 1:CV-97-1265. That case was settled in 1998. At that time, the parties agreed on an extensive Settlement Agreement, a copy of which was attached to the Complaint in this action.

In response to the Complaint, Defendants VanWagner, Smith, Peffer, Middle Paxton Township, Ernico, Mette, Evans & Woodside, P.C. and Davis filed a Joint Motion to Dismiss some of the claims set forth in the Complaint and for a More Definite Statement. Plaintiffs then filed an Amended Complaint, in accordance with F.R.C.P. 15, in which they have confined their claims under § 1983 and for civil conspiracy to violate their constitutional rights. Being of the opinion that the Amended Complaint was deficient in various respects, the aforesaid Defendant filed a Joint Motion to Dismiss Amended Complaint and/or For a More Definite Statement. This Brief is filed in support thereof.

II. STATEMENT OF ISSUES INVOLVED:

1. Whether Plaintiffs have failed to state claims under the 5th and 14th Amendments where there are adequate remedies under state law.

2. Whether Plaintiffs have failed to state the basis of a § 1983 claim against Defendant Ernico and his law firm where their role was

merely to provide advice and counsel but not to make policy or decisions.

3. Whether Plaintiffs' conspiracy claim must fail because it lacks the requisite specificity, and because the underlying claim upon which it is based is not justiciable.

4. Whether Plaintiffs' claims for punitive damages against Defendant Middle Paxton Township and the Defendant Supervisors in their official capacities should be dismissed.

5. Whether all of the individual Defendants are entitled to qualified immunity, and therefore dismissal of the action as to them, where the Plaintiffs have failed to allege that their conduct has violated clearly established constitutional law.

6. Whether, in the alternative, Plaintiffs should be required to file a more definite statement of the claims against the Defendants.

III. LEGAL DISCUSSION:

A. Plaintiffs have failed to state a claim upon which relief can be granted under the 5th and 14th Amendments because there are adequate remedies under state law.

Plaintiffs assert a § 1983 theory based upon an alleged denial of procedural due process as it relates to their attempts to develop a 10-lot subdivision.

As stated in Defendants' brief in support of their motion to dismiss Plaintiff's original Complaint, the courts have held that aggrieved parties, such as the Plaintiffs perceive themselves to be, cannot assert a direct claim

against actors such as the Defendants herein under either the 5th or 14th Amendments to the United States Constitution. The sole method to pursue such claims is pursuant to 42 U.S.C.A. § 1983.

> The Supreme Court has never held that there is an implied private right of action against a state, or a state actor, under the Fourteenth Amendment. The Supreme Court has enunciated an implied right of action under the Fourth and Fifth Amendments, but has gone no further. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) (Fourth Amendment implied right of action); *Davis v. Passman,* 442 U.S. 228, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979) (Fifth Amendment implied right of action). The Court need not break new legal ground by deciding whether there is an implied right of action under the Fourteenth Amendment because 28 U.S.C. § 1983 provides a remedy for violations of these rights. "Bivens teaches that the existence of an effective and substantial federal statutory remedy for the plaintiffs obviates the need to imply a constitutional remedy on [his] behalf." *Rogin v. Bensalem Twp.,* 616 F.2d 680, 686 (3rd Cir. 1980), *cert. denied sub nom, Mark-Gardner Assocs., Inc. v. Bensalem Twp.,* 450 U.S. 1029, 68 L.Ed.2d 223, 101 S.Ct. 1737 (1981). Accordingly, plaintiffs' first theory does not present a cause of action upon which relief can be granted.

Hammond v. Creative Financial Planning Organization, Inc., 800 F. Supp. 1244 (E.D. Pa. 1992). *See also Reynolds v. Wagner,* 936 F. Supp. 1216, 1223, n.4 (E.D. Pa. 1996).

Although some cases have suggested that a direct cause of action may exist under the Fifth Amendment,

those cases have limited direct causes of action under that Amendment to claims against federal officials. *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979). In addition, courts have also specified that the Fifth Amendment does not provide a direct cause of action under the just compensation clause. *Evans v. Washington County,* 1999 U.S. Dist. Lexis 20036 (D. Ore. 1999) at slip op. 2, n. 2. Furthermore, the Fifth Amendment is only applicable to the states and local municipalities through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, (1980); *Quality Refrigerated Services, Inc. v. City of Spenser,* 908 F. Supp. 1471 (N.D. Iowa 1995).

To the extent that the claim under Count I of the Amended Complaint asserts, *inter alia*, a cause of action under 42 U.S.C.A. § 1983, such claim is legally deficient. The Plaintiffs have adequate remedies as landowners and potential developers under state law to address the issues raised in the Amended Complaint, and they have failed to allege that such remedies are inadequate.

> It is the law in this Circuit that a state provides adequate due process when it provides "reasonable remedies to rectify a legal error by a local administrative body." Pennsylvania clearly provides such remedies . . . and therefore plaintiffs' [sic] have no justifiable due process claim.

Bello v. Walker, 840 F.2d 1124 at 1128 (CA 3d 1988).

> In Pennsylvania the procedure for challenging zoning ordinances substantially conforms with the general due process guidelines enunciated by the Supreme Court, ... Pennsylvania's system of adjudicating zoning challenges appears to be

> consistent with the requirements of due process. . .

Rogin v. Bensalem Township, 616 F2d 680 at 695 (CA 3d 1980). Plaintiffs have failed to set forth any behavioral or structural allegations from which the Court can infer that the process was unconstitutional.

For these reasons, Count I of the amended Complaint should be dismissed.

B. Plaintiffs have failed to state the basis of a § 1983 claim against Defendant Ernico and his law firm where their role, as solicitor to the Township, was merely to provide advice and counsel but not to make policy or decisions.

Defendant Jeffrey Ernico was the solicitor for Middle Paxton Township during the time period relevant to Plaintiffs' claims. Mr. Ernico was, and is, a partner in the law firm of Mette, Evans & Woodside, P.C.

The duties of a solicitor relative to a second class township, such as Middle Paxton Township, are set forth in 53 P.S. § 66103. The solicitor acts solely as the legal advisor to the board of supervisors; he has no legal authority to enact legislation or to make executive or administrative decisions. The solicitor may only act pursuant to the board of supervisors' authorization. A municipal solicitor is neither a "public employee" or a "public official" within the scope of the Ethics Act. *Ballou v. State Ethics Commission,* 496 Pa. 127, 436 A.2d 186 (1981).

The *Ballou* opinion contained the following quote regarding the position of a county solicitor:

> No functions of government are delegated to him. Nor can he lawfully exercise any powers of sovereignty. He serves as counsel to the commissioners in the discharge of their public duty just as any privately employed attorney serves his clients. His duties are to advise the commissioners and to represent the county in litigation authorized by them or instituted against the county.
>
> * * *
>
> His duties are important in the sense that the advice and actions of an attorney always entail grave responsibility; but they are performed for the board. He has no direct connection with, or responsibility to, the public; he is entirely subordinate to the board; they may follow his advice or disregard it; he cannot control their actions; he cannot perform their duties; his appointment is for no definite term, and he can be recalled at any time; he has no grave and important duties involving a function of government in their performance. . . .

Ballou, supra, 436 A.2d at 189-190.

Mr. Ernico is not a township official and, therefore, did not act at any time relevant to Plaintiffs' claims under color of state or local law, nor did his conduct constitute state action. Therefore, he and his law firm are not proper parties to the present matter.

The Court's attention is also directed to *Pacelli v. deVito*, 972 F.2d 871 (CA 7th 1992) and *Arnold v. Dvoskin*, 90 Civ. 4448 (E.D. N.Y. 1993) which held that an agency attorney cannot be liable under § 1983 for merely providing legal advice.

For these reasons, the Amended Complaint should be dismissed as to Defendant Jeffrey A. Ernico, Esquire and Defendant Mette, Evans & Woodside, P.C.

C. Plaintiffs' conspiracy claim must fail because it lacks the requisite specificity and because the underlying claim upon which it is based is not justiciable.

Count II of the Amended Complaint purports to set forth a claim for civil conspiracy to violate the Plaintiffs' federally protected rights. However, this claim is couched in nothing more than conclusory language and is wholly void of the requisite specificity required to set forth a cognizable claim of conspiracy in a civil rights context.

To show a conspiracy there must be evidence of (1) an actual violation of a right protected under § 1983 and (2) actions taken in concert by the defendants with the *specific intent* to violate such right. There must be an agreement or an understanding to deprive the plaintiff of his or her constitutional rights. *Williams v. Fedor*, 69 F.Supp. 649 at 665 (M.D. Pa. 1999).

Complaints in civil rights actions must be pleaded with factual specificity. *Hall v. Pennsylvania State Police,* 570 F2d 86 (CA 3d 1978); *United States v. City of Philadelphia,* 482 F. Supp. 1274 (E.D. Pa. 1979). Vague and conclusory allegations will not survive a motion to dismiss. *Id.* The purpose of the specificity requirement is to assure that civil rights actions are not frivolously brought and to enable the court to assess whether the action may be meritorious. *Shirey v. Bensalem Township,* 501 F. Supp. 1138 at 1141 (E.D. Pa. 1980).

The same requirement of factual specificity is no less true for civil rights claims based upon an alleged conspiracy. It is a longstanding rule in the Third Circuit that a mere general allegation of conspiracy is insufficient. *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 595 F.Supp. 1385 at 1400 (D.Del. 1984), aff'd 769 F.2d 152 (CA 3d 1985).

> Numerous circuit courts have held that a conspiracy can be the basis of a § 1983 action, *but conclusory allegations of a conspiracy cannot withstand a motion to dismiss.* (emphasis added)

Shirey v. Bensalem Township, 501 F. Supp. 1138 at 1141 (E.D. Pa. 1980).

> The plaintiffs must plead with particularity the "circumstances" of the alleged wrong doing in order to place the defendants on notice of the precise misconduct with which they are charged. Only allegations of conspiracy which are particularized, such as those addressing (1) the period of the conspiracy, (2) the object of the conspiracy, and (3) certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient.

Loftus v. SEPTA, 843 F. Supp. 981 at 986 (E.D. Pa. 1994); *Labalokie v. CAIU*, 926 F. Supp. 503 at 508-509 (MD. Pa. 1996)

The allegations of conspiracy must be of such sufficiency as to describe the general composition of the conspiracy, some or all of its broad objectives, and a defendant's general role in that conspiracy. *Alfaro v. E.F. Hutton & Co.,* 606 F. Supp. 1100 (E.D. Pa. 1985). An inference of conspiracy from the pleading is no substitute

for the requirement that the circumstances of the conspiracy be pleaded with specificity. *Kalmanovitz,* supra.

Here the Plaintiffs have failed to identify the acts of the various Defendants which might arguably constitute a conspiracy. Rather, the Plaintiffs "lump" all of the Defendants together as a single unit in their conspiracy theory without identifying the specific actions of each of the alleged conspirators. The necessity of articulating the acts of each conspirator becomes particularly critical in circumstances such as those presented in this case where not all of the Defendants share the same legal authority to undertake acts that might deprive the Plaintiffs of their rights. For example, Defendant Mary Jane Davis, as Township Enforcement Officer, does not have any legal authority to approve or disapprove subdivision applications, such authority being vested solely in the Board of Supervisors.

Moreover, if the Amended Complaint fails to state a cause of action for a § 1983 claim, as argued above, then the cause of action based upon an alleged conspiracy to violate the Plaintiffs' federally protected rights must fail. There can be no actionable conspiracy to commit an act if the act itself is not justiciable.

For these reasons Count II of the Amended Complaint should be dismissed.

D. Plaintiffs' claims for punitive damages against Middle Paxton Township and the Township Supervisors in their official capacities must be dismissed.

The case law with respect to this issue was clearly established by the United States Supreme Court in the

case of *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981). No basis exists upon which Plaintiffs' claims in this regard should be permitted to proceed. Punitive damages may only be recovered against local officials in their individual capacities. Moreover, since a claim against a public official in his official capacity is the same as a claim against the entity, punitive damages are not available against a municipal official acting in that official capacity. *Bourque v. Town of Bow*, 736 F. Supp. 398 (D.N.H. 1990). Accordingly, Defendants request that Plaintiffs' claims for punitive damages against Middle Paxton Township and the individual Middle Paxton Township Defendants in their official capacities be dismissed.

E. The Individual Defendants are entitled to qualified immunity and dismissal of the action against them where Plaintiffs have failed to allege that the conduct of the individual Defendants has violated clearly established constitutional law.

State and local officials who carry out executive and administrative functions, in contrast to legislative functions, may assert the defense of qualified immunity. In land use cases, the enactment, amendment or repeal of zoning and subdivision ordinances has been regarded as legislative in nature. On the other hand, rulings on various applications for approvals, variances, conditional uses, etc. have been regarded as executive in nature. *Botton v. Marple Twp.*, 689 F. Supp. 477 (E.D. Pa. 1988).

In 1982 the Supreme Court established the governing test for qualified immunity, namely, whether the official violated clearly established federal law. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed. 2d 396 (1982).

Specifically, public officials who carry out executive and administrative functions are protected from personal monetary liability so long as their actions do not violate "clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." *Harlow*, supra, 457 U.S. at 818. This standard, which turns on the "objective legal reasonableness" of the official [*Harlow*, supra, 457 U.S. at 819], protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335 at 341, 106 S.Ct. 1092, 89 L.Ed. 2d 271 (1986).

Qualified immunity applies in cases involving claims against public officials in their individual capacities; it does not apply to official capacity claims because such claims are the equivalent of a claim against the governmental entity on whose behalf the official is acting. The purposes of qualified immunity is to protect public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, supra, 457 U.S. at 806.

The Amended Complaint does not allege that the individual Defendants are *not* entitled to qualified immunity, nor does it allege that the individual Defendants violated clearly established federal law. In the absence of such allegations, the individual Defendants are entitled to qualified immunity and the Amended Complaint should be dismissed as to such Defendants. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985); *Siegert v. Gilley,* 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed. 2d 277 (1991).

F. In the alternative, Plaintiffs should be required to file a more definite statement of the claims against Defendants since the allegations are vague, conclusory and ambiguous, and they fail to differentiate the acts and/or omissions of each Defendant.

As previously discussed herein, a complaint alleging a civil rights violation must be pleaded with some degree of specificity, and certainly in terms that are not vague, conclusory and/or ambiguous.

A more definite statement is necessary to permit Defendants to properly respond to the Amended Complaint in that Plaintiffs fail to articulate and differentiate between the actions or omissions of each of the Defendants. Not all of the individual Defendants are of the same legal stature, nor do they have the same authority and powers as it relates to the proposed development of the Plaintiffs' land. For example, where the Enforcement Officer may have the authority to issue building permits, the Township Supervisors do not. On the other hand, the Supervisors have the authority to approve subdivision plans which the Enforcement Officer does not. The Plaintiffs should be required to frame a pleading which addresses the acts or omissions of each Defendant or related groups of Defendants, as opposed to lumping them all together as if they were interchangeable parts.

Furthermore, Plaintiffs fail to set forth their causes of actions in separate counts. These failures make the Complaint vague and ambiguous. In addition, Defendants are not able to respond to the allegations against each of them. These deficiencies in the Plaintiffs' Amended Complaint are substantial and Plaintiffs should be directed to file a more definite statement of the facts, if any exist,

which form the basis of their claims against the Defendants.

Respectfully submitted

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CERTIFICATE OF SERVICE

AND NOW, I, C. KENT PRICE, ESQUIRE, for the firm of THOMAS, THOMAS & HAFER, LLP, attorneys for Defendants J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Middle Paxton Township and Mary Jane Davis, hereby certify that I have this day served the within Brief in Support of Joint Motion to Dismiss Amended Complaint and/or for a More Definite Statement by depositing a copy of the same in the United States Mail, postage prepaid, at Harrisburg, Pennsylvania, addressed to:

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(3)

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 02-1812

In the Supreme Court of the United States

June Term 2003

RICHARD C. ANGINO; ALICE K. ANGINO; KING DRIVE CORP.,

Petitioners

v.

J. THOMAS VAN WAGNER; JEFFERY SMITH; RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Respondents

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE CASE

Defendant Respondents' Brief asserts at page 2

> This petition makes abundant references to a document styled 'Plaintiffs' Summary of Undisputed Facts' submitted to the District Court. Petitioners state, 'The following facts are undisputed.' Pet., at 4. The statement is untrue and misleading to this Court. ...

Defendants/Respondents, however, fail to reference a single fact or assertion that "is untrue and misleading to this Court." Factual data such as the size of the Township, the number of residents, the type of housing, the size lot required for dwellings slope requirements, population and housing growth or lack of same, are all indisputable figures taken from census tables and or the Township's own Zoning and Land Development Ordinances.

Petitioners unsuccessful attempt to develop their property since 1989 is also similarly indisputable.

The parties March 16, 1998 settlement agreement clearly stated:

> The Anginos agree to withdraw their pending Federal Action which is in the nature of a federal Civil Rights action against the Township, its elected and appointed officials and to execute a Release of all of the Defendants in the Federal Action in the form attached hereto. The said withdrawal of the Federal Action shall be with prejudice with respect to all *past* acts and allegations contained in the pleadings in said Federal Action. *However, the Anginos do reserve the right, and the Township so agrees, to refer to the factual circumstances set forth in their present Federal Action in the event they should find it necessary to file a future cause of action against*

> *Middle Paxton Township*, but any such reference shall be solely for purposes of showing a *"course of conduct during an earlier period"* and not for purposes of establishing damages arising out of said conduct. Any damages to which the Anginos shall be entitled shall be solely based upon new factual circumstances arising after the date of this Agreement.

(67a) (emphasis added)

Petitioners' second amended complaint has a section "*D New Factual Circumstances Arising After the Date of the Settlement Agreement*" and follows with paragraphs 23-80 specifically referencing the 1998 comprehensive plan, the 2000 zoning ordinance, and specific civil rights violations that have occurred *since 1998* involving the interpretation of existing laws and the refusal to grant appropriate variances and permits as well as making unreasonable demands for development which led to Judge Turgeon's finding the Township to be guilty of bad faith. (Paras. 68-71 of the Second Amended Complaint; 74a-75a; *also see* Paras. 77-80, 75a-77a)

The reference to the Trial Judge's dismissal of the instant action "without prejudice" fails to consider that delay and multiple actions in and of themselves constitute prejudice. Delay in and of itself may result in bankruptcy or inability to proceed with a particular development. Associated legal expenses can similarly roadblock a project. Our Constitutional right to do what we want with our property should not be further eroded by a "ripeness" doctrine that provides little benefit and can be a municipal tool to stymie development.

REASONS FOR GRANTING THE WRIT

Defendants/Respondents assert "none of these issues satisfy the criteria under Rule 10 of this Court with respect to considerations governing review on Certiorari. The Petitioners present no compelling reason for grant of Certiorari. They present no decision in conflict with the decision of any other court on the same important matter nor does this decision depart "from the accepted and usual course of judicial proceedings."

As for "compelling reason," your Court has found a compelling reason to address zoning issues on a number of occasions over the last decade. You last addressed "ripeness" in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

Defendants/Respondents contend that the *Williamson Planning* decision is "settled law." The interpretation of the Third Circuit and the District Court, however, in the instant case have extended *Williamson Planning* far beyond your intent and your language to require that constitutional challenges be pursued with respect to ordinances passed by the highest public officials after years of comprehensive plan meetings, public hearings, zoning meetings, etc. In this case, that process took five years from 1995 to 2000. The constitutional challenge process has already taken almost a year and a half and twelve hearings. It may be another six months or a year until the supervisors render a decision as to the constitutional challenge.

The same supervisors who passed the 2000 zoning ordinance are the judges who will eventually decide the constitutionality of the zoning ordinance that they passed in the year

2000. Presumably, these supervisors received legal advice *prior* to adopting the 2000 zoning ordinance. The factual record in the instant case is clear that Petitioners wrote the township supervisors numerous letters and at the time had pending a civil rights action challenging the constitutionality and/or propriety of the 2000 zoning ordinance. Petitioner's second amended complaint challenged the constitutionality and propriety of the 2000 zoning ordinance To require, in addition the constitutional challenge process to finality constitutes a waste of time, money, and judicial resources. As discussed under the "statement of the case", the "ripeness" prerequisite may be used by anti-developmental municipal bodies as another shield to preclude development.

If the supervisors agreed with Petitioners, they could have long since this time amended the 2000 ordinance to conform with the law. They have chosen not to do this. It is highly unlikely that they will decide in Petitioner's favor as to the constitutional challenge because to do so, they would have to admit that they were wrong in adopting the 2000 zoning ordinance. If they admit that they were wrong, that will be a foundation for the civil rights action. If they refuse to admit that they are wrong, Petitioner's civil rights action will then become "ripe" and Petitioners will be able to proceed with same. In either case, Petitioners will be able to and will proceed with their civil rights action.

The Pennsylvania Supreme Court has recently unanimously decided *C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143 (Pa. 2002) which strongly supports Petitioner's position as to zoning passed for the purpose of maintaining a bucolic or country community and/or to require large lots for the purpose of maintaining what the highest political officials feel is an attractive, desirable bucolic, country, agricultural setting.

Reasons for Granting the Writ

Although Defendants/Respondents' decisions with respect to the 1998 comprehensive plan and 2000 zoning ordinance are a major part of Petitioner's second amended complaint, the civil rights violations asserted therein did not even exist at the time of Petitioner's original complaint and amended complaint and, consequently, the allegations raised in the original complaint and the Amended Complaint cannot logically or legally be and were not initially dismissed on the issue of "ripeness" which Defendants/Respondents admit applies to the 2000 zoning ordinance and was raised only as to the 2000 zoning ordinance.

If Defendant Respondents contend that "ripeness" applies to each and every decision made by the highest political body, in interpreting laws and/or granting permits on variances it again would be extending *Williamson Planning* far beyond its language and intent which was to apply to decisions of lower level officials or employees. Also to require the highest level decisions for each and every claimed civil rights violation would result in near impossibility in proceeding against municipal bodies where there are a variety of violations, each of which would have to be carried through to a final appeal and a final decision by the highest municipal officials.

Finally, it is clear from Petitioner's Writ that Defendant's actions are not only in conflict with Your Court's decision in *Williamson Planning Commission* but also *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), *aff'd on other grounds*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999); *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989). It is Petitioner's position also that the Third Circuit's decision in the instant case is an impermissible extension of the Third Circuit's decisions in *New Hanover Township v. United States Army Corps of Engineers*, 992 F.2d 470

(3rd Cir. 1993); *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3rd Cir. 1993); *Acierno v. Mitchell*, 6 F.3d 970 (3rd Cir. 1993); *Sameric Corp. of Delaware v. City of Philadelphia*, 142 F.3d 582 (3rd Cir. 1998). *See, Acierno v. New Castle County*, 2000 U.S. Dist. LEXIS 7853 (D. Del. May 23, 2000) as to the six or seven-year delay from the District Court decision dismissing the case on ripeness, refiling, and the eventual decision reached by the trial court. The instant case had proceeded to the point of trial when it was at the last moment dismissed on a ripeness basis. It will obviously be at least another year until Petitioners can refile. Your Court's guidance is needed to preclude future delays, expense, and waste of judicial resources.

Respectfully submitted
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PROOF OF SERVICE

I, Richard C. Angino, Esquire, hereby certify that I have this 28th day of July, 2003, served three true and correct copies of Petitioners' Reply Brief by sending same by United States first-class mail, postage prepaid, to the following:

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